FEDERAL REGISTER

Vol. 87 Wednesday
No. 51 March 16, 2022

Pages 14757–15024

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 87 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Contents

Federal Register

Vol. 87, No. 51

Wednesday, March 16, 2022

Separate Parts In This Issue

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 87, No. 51
Wednesday, March 16, 2022

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2671–20; DHS Docket No. USCIS–2020–0017]

RIN 1615–AC59

Asylum Interview Interpreter Requirement Modification Due to COVID–19

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Temporary final rule; extension.

SUMMARY: The Department of Homeland Security (DHS) is extending, for a third time, the effective date (for 365 days) of its temporary final rule that modified certain regulatory requirements to help ensure that USCIS may continue with affirmative asylum adjudications during the COVID–19 pandemic.

DATES: This temporary final rule is effective from March 16, 2022 through March 16, 2023. As of March 16, 2022, the expiration date of the temporary final rule published at 85 FR 59655 (Sept. 23, 2020), which was extended at 86 FR 15072 (Mar. 22, 2021), and at 86 FR 51781 (Sept. 17, 2021), is further extended from March 16, 2022 through March 16, 2023. If conditions improve and the health concerns posed by COVID–19 are resolved before this temporary final rule expires, DHS will consider publishing a final rule terminating this temporary final rule prior to the expiration of this 365-day extension.

FOR FURTHER INFORMATION CONTACT: Rená Cutlip-Mason, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588–0009; telephone (240) 721–3000 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Legal Authority To Issue This Rule and Other Background

A. Legal Authority

The Secretary of Homeland Security (Secretary) takes this action pursuant to his authorities concerning asylum determinations. The Homeland Security Act of 2002 (HSA), Public Law 107–296, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA amended the Immigration and Nationality Act (INA or the Act), charging the Secretary ''with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,'' INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granted the Secretary the power to take all actions ''necessary for carrying out'' the immigration laws, including the INA, *id.* 1103(a)(3). The HSA also transferred to DHS responsibility for affirmative asylum applications made outside the removal context. *See* 6 U.S.C. 271(b)(3). That authority has been delegated within DHS to U.S. Citizenship and Immigration Services (USCIS). USCIS asylum officers determine, in the first instance, whether a noncitizen's affirmative asylum application should be granted. *See* 8 CFR 208.4(b), 208.9. With limited exception, the Department of Justice Executive Office for Immigration Review has exclusive authority to adjudicate asylum applications filed by noncitizens who are in removal proceedings. *See* INA 103(g), 240; 8 U.S.C. 1103(g), 1229a. This broad division of functions and authorities informs the background of this rule.

B. Legal Framework for Asylum

Asylum is a discretionary benefit that generally can be granted to eligible noncitizens who are physically present or who arrive in the United States, irrespective of their status, subject to the requirements in section 208 of the INA, 8 U.S.C. 1158, and implementing regulations, *see* 8 CFR parts 208, 1208.

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), imposes several mandates and procedural requirements for the consideration of asylum applications. Congress also specified that the Attorney General and Secretary of Homeland Security ''may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). Thus, the current statutory framework leaves the Attorney General (and, after the HSA, also the Secretary) significant discretion to regulate consideration of asylum applications. USCIS regulations promulgated under this authority set agency procedures for asylum interviews, and require that applicants unable to communicate in English ''must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent.'' 8 CFR 208.9(g). This requirement means that all asylum applicants who cannot communicate in English must bring an interpreter to their interview. Doing so, as required by the regulation, poses a serious health risk because of the COVID–19 pandemic.

Accordingly, this temporary final rule extends the rule published at 85 FR 59655, for a third time, to continue to mitigate the spread of COVID–19 by seeking to slow the transmission and spread of the disease during asylum interviews before USCIS asylum officers. To that end, this temporary final rule will extend the requirement in certain instances allowing noncitizens interviewed for this discretionary asylum benefit to use USCIS-provided interpreters during affirmative asylum interviews. This temporary final rule also provides that if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization under 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.

C. The COVID–19 Pandemic

On January 31, 2020, the Secretary of Health and Human Services (HHS) declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID–19, which is caused

by the SARS–CoV–2 virus.[1] Effective January 14, 2022, HHS renewed the determination that ''a public health emergency exists and has existed since January 27, 2020, nationwide.'' [2] On February 18, 2022, the President issued a continuation of the National Emergency concerning the COVID–19 pandemic.[3] As of March 4, 2022, there have been over 440 million confirmed cases of COVID–19 identified globally, resulting in more than 5.9 million deaths.[4] Approximately 78,428,884 cases have been identified in the United States, with about 242,345 new cases identified in the 7 days preceding February 28, 2022, and approximately 947,625 reported deaths due to the disease.[5] A more detailed background discussion of the COVID–19 pandemic is found in the original temporary final rule, as well as in the first and second extensions of the rule, and USCIS incorporates the discussions of the pandemic into this extension. *See* 85 FR 59655; 86 FR 15072; 86 FR 51781.

Since publication of the original temporary final rule, variants of the virus that causes COVID–19 have been reported in the United States.[6] Evidence suggests that some variants may spread more quickly and easily than others and at least one variant may cause more severe illness than other variants.[7] The COVID–19 Delta and Omicron variants were labeled as Variants of Concern (VOC) by the HHS SARS–CoV–2 Interagency Group (SIG), which defines VOCs as those with evidence of increased transmissibility and severe disease, reduced effectiveness of treatments or vaccines, and diagnostic detection failures.[8] Following the first Omicron case reported in the United States, on December 1, 2021, there was a rapid increase in infections and hospitalizations with multiple large clusters of outbreaks that peaked in mid-January 2022.[9] Since mid-January 2022, the number of COVID–19 infections and hospitalizations in the United States has decreased (as of March 6, 2022), although COVID–19 infections continue to be reported.[10]

The U.S. Food and Drug Administration (FDA) granted approval for the Pfizer-BioNTech COVID–19 vaccine for individuals 16 years and older in August 2021 [11] and the Moderna COVID–19 vaccine for individuals 18 years and older in January 2022.[12] While the vaccine is widely accessible in the United States, geographic data indicates a wide disparity in the percentages of fully vaccinated individuals by state, ranging from 50.3 percent in Alabama to 80.9 percent in Rhode Island, not taking into account United States territories.[13] Although the FDA has determined that approved COVID–19 vaccines are effective in eligible individuals, their effectiveness at preventing infection wanes over time, and thus, CDC guidance states that eligible individuals should receive COVID–19 vaccine booster shots after certain periods of time.[14] CDC's decision to begin booster shots in late 2021 was based on information about vaccine effectiveness and the impact of variants on vaccine effectiveness.[15] A January 2022 study indicated that the COVID–19 pandemic is driven by seasonality.[16] Another study indicated that seasonal factors, alongside the increased demand for healthcare resources due to seasonal influenza, should be taken into account when developing future intervention measures.[17]

Ongoing research demonstrates that while there is high effectiveness of approved vaccines among eligible individuals, fully vaccinated individuals continue to experience breakthrough COVID–19 infections and may be either symptomatic or asymptomatic.[18] Nevertheless, CDC reports show that individuals who are unvaccinated have a greater risk of testing positive for COVID–19 and a greater risk of dying from COVID–19 than individuals who are fully vaccinated.[19]

On February 25, 2022, CDC updated the framework for monitoring the spread of COVID–19 in communities across the United States.[20] The framework involves evaluating factors related to the severity of disease, including hospitalizations and hospital capacity, to help determine whether the level of COVID–19 and severe disease are low, medium, or high in a community (known as ''COVID–19 community levels'').[21] Depending on the COVID–19 community level, CDC recommends different individual, household, and community-level prevention strategies,

[1] HHS, Determination that a Public Health Emergency Exists (Jan. 31, 2020), *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.*

[2] HHS, Renewal of Determination that a Public Health Emergency Exists (Jan. 14, 2022), *https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx.*

[3] Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic, 87 FR 10289 (Feb. 23, 2022); Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

[4] WHO Coronavirus (COVID–19) Dashboard (updated Mar. 4, 2022), *https://covid19.who.int/.*

[5] *Id.*

[6] Centers for Disease Control and Prevention (CDC), SARS–CoV–2 Variant Classifications and Definitions (updated Dec. 1, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html.*

[7] CDC, What You Need to Know About Variants (updated Feb. 25, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html.*

[8] CDC, SARS–CoV–2 Variant Classifications and Definitions.

[9] CDC, Rapid Increase of Omicron Variant Infections in the United States: Management of Healthcare Personnel with SARS–CoV–2 Infection or Exposure (Dec. 24, 2021), *https://emergency.cdc.gov/han/2021/pdf/CDC_HAN_460.pdf;* CDC, Potential Rapid Increase of Omicron Variant Infections in the United States (updated Dec. 20, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html;* CDC, COVID Data Tracker—Trends in Number of COVID–19 Cases and Deaths in the U.S. Reported to CDC, by State/Territory (updated Mar. 6, 2022), *https://covid.cdc.gov/covid-data-tracker/#trends_dailycases;* CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID–19 Per 100,000 Population by Age Group, United States (updated Mar. 6, 2022), *https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions.*

[10] CDC, COVID Data Tracker—Trends in Number of COVID–19 Cases and Deaths in the U.S. Reported by CDC, by State/Territory; CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID–19 Per 100,000 Population by Age Group, United States.

[11] FDA, FDA Approves First COVID–19 Vaccine (Aug. 23, 2021), *https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.*

[12] CDC, Moderna COVID–19 Vaccine (also known as Spikevax) Overview and Safety (updated Feb. 1, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Moderna.html.*

[13] CDC, COVID Data Tracker—COVID–19 Vaccinations in the United States (updated Mar. 6, 2022), *https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total.*

[14] CDC, COVID–19 Vaccine Booster Shots (updated Feb, 2, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html;* FDA, COVID–19 Frequently Asked Questions (updated Jan. 7, 2022), *https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions;* CDC, Stay Up to Date with Your Vaccines (updated Jan. 16, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html.*

[15] CDC, COVID–19 Vaccine Booster Shots.

[16] Mario Coccia, COVID–19 Pandemic Over 2020 (With Lockdowns) and 2021 (With Vaccinations): Similar Effects for Seasonality and Environmental Factors, 208 Environmental Research (2022), *https://www.sciencedirect.com/science/article/pii/S001393512200038X?via%3Dihub* (last visited Mar. 4, 2022).

[17] NIH, The role of seasonality in the spread of COVID–19 pandemic (Feb. 19, 2021), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7892320/.*

[18] CDC, The Possibility of COVID–19 after Vaccination: Breakthrough Infections (updated Dec. 17, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html.*

[19] CDC, Rate of COVID–19 Cases and Deaths by Vaccination Status, *https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status,* (last visited Mar. 7, 2022).

[20] CDC, CDC Newsroom—Transcript of CDC Media Telebriefing: Update on COVID–19 (Feb. 25, 2022), *https://www.cdc.gov/media/releases/2022/t0225-covid-19-update.html.*

[21] *Id.*

which may or may not include wearing facial covers indoors.[22] As a result of CDC's COVID–19 community levels guidance, the Safer Federal Workforce Task Force, which is led by the White House COVID–19 Response Team, issued updated facial covers and screening testing guidelines on February 28, 2022, for employees, contractors, and visitors to Federal buildings.[23]

Widespread testing is available to confirm suspected cases of COVID–19 infection but testing performance varies by type, with antigen tests being less sensitive than Nucleic Acid Amplification Tests (NAATs).[24] This may require symptomatic people with negative tests to retest in order to confirm results.[25] CDC states that the predictive value of a test will also depend on COVID–19 community levels.[26] The use of NAATs in areas with a high COVID–19 community level and increased testing demand may result in test processing delays while a highly specific antigen test may result in many false positives in an area where infection rates are low.[27] This is because test predictive values are dependent on pretest probability, or the COVID–19 community level and the clinical context of those being tested.[28] CDC guidance states that individuals who were exposed to a person with COVID–19 may or may not need to self-quarantine depending on vaccination status and whether they develop symptoms.[29]

II. Purpose of This Temporary Final Rule

USCIS continues its efforts to protect the health and safety of its employees and the public by requiring all federal employees, on-site contractors, and visitors to follow local USCIS guidance on physical distancing and workplace protection guidance consistent with CDC and agency guidance.[30] Also, USCIS regularly updates its guidance on facial covers for all employees and members of the public to reflect evolving CDC guidance.[31]

USCIS has conducted 32,012 total asylum interviews between September 23, 2020 and March 7, 2022.[32] The original temporary final rule, implemented on September 23, 2020, and its extensions implemented on March 22 and September 20, 2021, and other noted public safety measures have helped mitigate the impact of COVID–19 and have been effective in keeping the USCIS workforce and the public safe. As of February 25, 2022, there have been 4,061 confirmed cases of COVID–19 exposure among USCIS employees and contractors. The overall percentage of positive cases reported among USCIS employees since the start of the pandemic is 14.3 percent.

Therefore, DHS has determined that it is in the best interest of the public and USCIS employees and contractors to extend the temporary final rule for 365 days. Under this third extension, USCIS will continue requiring asylum applicants who are unable to proceed with the interview in English to use government-provided telephonic contract interpreters if the applicants speak one of the 47 languages found on the Required Languages for Interpreter Services Blanket Purchase Agreement/U.S. General Services Administration Language Schedule (''GSA Schedule''). If the applicant does not speak or elects to speak a language not on the GSA Schedule, the applicant will be required to bring his or her own interpreter who is fluent in English and the elected language not on the GSA schedule, to the interview. In the second extension of the temporary final rule, published at 85 FR 59655, DHS also amended 8 CFR 208.9(h)(1) by allowing, in USCIS' discretion, an applicant for asylum to provide an interpreter when a USCIS interpreter is unavailable. *See* 86 FR 51781. Specifically, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.

DHS incorporates into this third extension, the justifications from the original temporary final rule and all subsequent extensions. The measures implemented since the original temporary final rule to protect employees, asylum applicants, and other members of the public, continue to be a priority for USCIS. Additionally, the modification to the second extension (*i.e.,* USCIS exercising discretion to allow an asylum applicant to bring an interpreter to the interview if a contract interpreter is unavailable), will remain in place. The modification has given USCIS flexibility to plan ahead in the limited circumstances when a contract interpreter is expected to be unavailable for an asylum interview, reducing the likelihood of canceled interviews and unused office space. This third extension also incorporates the discussions on the overall benefits of providing telephonic contract interpreters in reducing the risk of contracting COVID–19 for applicants, attorneys, interpreters, and USCIS employees, from the original temporary final rule and all extensions.

III. Discussion of Regulatory Change: 8 CFR 208.9(h)[33]

DHS has determined that there are reasonable grounds for considering potential exposure to SARS–CoV–2, including any emerging variants, as a public health concern and that these grounds are sufficient to extend the temporary final rule modifying the interpreter requirements for asylum applicants in order to lower the number of in-person attendees at asylum interviews. For 365 days following publication of this temporary final rule, DHS will continue to require non-English speaking asylum applicants appearing before USCIS to proceed with the asylum interview using USCIS' interpreter services if they are fluent in one of the 47 languages as discussed in the temporary final rule at 85 FR at 59657.[34] Additionally, as provided in 8 CFR 208.9(h)(1), DHS will continue to allow, in USCIS' discretion, an applicant for asylum to provide an

[22] CDC, COVID–19 Community Levels (updated Feb. 25, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html.*

[23] Safer Federal Workforce, Mask-Wearing, *https://www.saferfederalworkforce.gov/faq/mask-wearing/* (last visited Mar. 3, 2022).

[24] CDC, Overview of Testing for SARS–CoV–2 (COVID–19) (updated Feb. 11, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] CDC, Quarantine & Isolation (updated Jan. 27, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html.*

[30] USCIS Response to COVID–19 (updated Jan. 25, 2022), *https://www.uscis.gov/about-us/uscis-response-to-covid-19.*

[31] *Id.*

[32] Between September 23, 2020 and March 10, 2021, USCIS conducted 7,764 asylum interviews. *See* 86 FR at 15074. Between March 10, 2021, and August 8, 2021, USCIS conducted 9,136 asylum interviews. *See* 86 FR at 51784.

[33] The interpreter interview provisions can be found in two parallel sets of regulations: Regulations under the authority of DHS are contained in 8 CFR part 208; and regulations under the authority of the Department of Justice (DOJ) are contained in 8 CFR part 1208. Each set of regulations contains substantially similar provisions regarding asylum interview processes, and each articulates the interpreter requirement for interviews before an asylum officer. *Compare* 8 CFR 208.9(g), *with* 8 CFR 1208.9(g). This temporary final rule and its extensions revise only the DHS regulations at 8 CFR 208.9. Notwithstanding the language of the parallel DOJ regulations in 8 CFR 1208.9, as of the effective date of this action, the revised language of 8 CFR 208.9(h) is binding on DHS and its adjudications for 365 days. DHS is not bound by the DOJ regulation at 8 CFR 1208.9(g).

[34] DHS notes that this extension does not modify 8 CFR 208.9(g); rather the extension of the temporary final rule is written so that asylum interviews occurring while the temporary final rule is effective will be bound by the requirements at 8 CFR 208.9(h).

interpreter when a USCIS interpreter is unavailable. In these limited circumstances, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter. The interpreter will be required to follow USCIS COVID–19 protocols in place at the time of the interview, including sitting in a separate office. Once this temporary final rule is no longer in effect, asylum applicants unable to proceed with an affirmative asylum interview based on a Form I–589, Application for Asylum and for Withholding of Removal, in English before a USCIS asylum officer will be required to provide their own interpreters under 8 CFR 208.9(g).

Given the unique nature of the pandemic and the multiple challenges it has presented in the context of USCIS operations, the agency has had to modify its policies and procedures to adapt. Through the original temporary final rule and the first and second extensions, USCIS adapted and modified its procedures to keep the workforce and public safe while also striving to serve the customer. Outside of this rule, USCIS has adapted to the pandemic by developing electronic workflows for conducting interviews and completing the adjudication, and by monitoring language trends and interpreter availability.

DHS noted in the original temporary final rule, first extension, and second extension with modification, that it would evaluate the public health concerns and resource allocations to determine whether to extend the rule. DHS has determined that extending this temporary final rule is necessary for public safety. Accordingly, DHS is extending this temporary final rule for 365 days unless it is necessary to once again extend at a later date. This temporary final rule continues to apply to all affirmative asylum interviews conducted by USCIS across the nation. USCIS has determined that an extension of 365 days is appropriate given that: (1) The pandemic is ongoing; [35] (2) the highly contagious Omicron variant is circulating in the United States; [36] (3) while vaccines are widely available, data indicates a wide disparity in the percentages of fully vaccinated individuals by state, and fully vaccinated individuals continue to experience breakthrough SARS–CoV–2 infections; [37] and (4) although as of March 6, 2022, hospitalizations have decreased from January 2022, when they reached their highest 7-day average admission rate since the start of the pandemic, individuals continue to be hospitalized for COVID–19.[38]

USCIS first published this temporary final rule on September 23, 2020, and subsequently found it necessary to publish two extensions to continue its mitigation efforts because of the ongoing pandemic.[39] The initial temporary final rule and each extension had an effective period of 180 days, which has resulted in this temporary final rule being in effect for 540 days.[40] Considering the period of time that the pandemic has been ongoing, the number of times USCIS has had to extend this temporary final rule, the continued uncertainty about emerging variants, and the inability to predict when the COVID–19 pandemic will end, USCIS has determined that an additional extension of 180 days will be insufficient and a 365-day extension will better serve the needs of the public and the agency. Extending this temporary final rule for 365 days will provide the public and USCIS with greater certainty and predictability about how long these mitigation efforts will remain in place. That is, with the additional time, the agency can proactively plan ahead and focus on providing consistent services to asylum applicants rather than expending limited resources frequently changing procedures and re-issuing guidance to staff and the public.

Recognizing that the COVID–19 pandemic is ongoing and unpredictable, DHS continues to constantly evaluate the public health concerns and its mitigation efforts. Within the next 365 days, it is possible that conditions may either improve or worsen. If conditions improve and the health concerns posed by COVID–19 are resolved before this temporary final rule expires, DHS will consider publishing a final rule terminating this temporary final rule prior to the expiration of this 365-day extension. However, if prior to the expiration of this extension, conditions remain static or worsen, DHS will again evaluate the public health concerns and resource allocations to determine if another extension is appropriate to further the goals of promoting public safety. After such evaluation and if another extension is determined to be necessary, DHS would publish any such extension via a rulemaking in the **Federal Register**.

IV. Regulatory Requirements

A. Administrative Procedure Act (APA)

DHS is issuing this extension as a temporary final rule pursuant to the APA's ''good cause'' exception. 5 U.S.C. 553(b)(B). DHS may forgo notice-and-comment rulemaking and a delayed effective date because the APA provides an exception from those requirements when an agency ''for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B); *see* 5 U.S.C. 553(d)(3).

The good cause exception for forgoing notice-and-comment rulemaking ''excuses notice and comment in emergency situations, or where delay could result in serious harm.'' *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is ''narrowly construed and only reluctantly countenanced,'' *Tenn. Gas Pipeline Co.* v. *FERC,* 969 F.2d 1141, 1144 (D.C. Cir. 1992), DHS has appropriately invoked the exception in this case, for the reasons discussed in this temporary final rule. When it became clear to DHS that the continuing public health emergency would warrant another extension of this temporary final rule, there was not sufficient time to provide notice and receive comment before the second extension would expire. Additionally, on multiple occasions, agencies have relied on this exception to promulgate both communicable disease-related [41] and immigration-related [42] interim rules, as

[35] *See* 86 FR 11599; 85 FR 15337; HHS, Renewal of Determination that a Public Health Emergency exists.

[36] CDC, Omicron Variant: What You Need to Know (updated Feb. 2, 2022), *https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html;* CDC, COVID Data Tracker: Variant Proportions (updated Mar. 1, 2022), *https://covid.cdc.gov/covid-data-tracker/#variant-proportions.*

[37] CDC, COVID Data Tracker—COVID–19 Vaccinations in the United States; CDC, The Possibility of COVID–19 after Vaccination: Breakthrough Infections.

[38] CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID–19 Per 100,000 Population by Age Group, United States.

[39] *See* 85 FR 59655 (Sept. 23, 2020); 86 FR 15072 (Mar. 22, 2021); 86 FR 51781 (Sept. 17, 2021).

[40] *Id.*

[41] HHS Control of Communicable Diseases; Foreign Quarantine, 85 FR 7874 (Feb. 12, 2020) (interim final rule to enable the CDC ''to require airlines to collect, and provide to CDC, certain data regarding passengers and crew arriving from foreign countries for the purposes of health education, treatment, prophylaxis, or other appropriate public health interventions, including travel restrictions''); Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals, 68 FR 62353 (Nov. 4, 2003) (interim final rule to modify restrictions to ''prevent the spread of monkeypox, a communicable disease, in the United States.'').

[42] *See, e.g.,* Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 04, 2016) (interim rule citing good cause to immediately require a passport and visa from

well as to extend such rules.[43] Recently, the Department of State (DOS) and the Federal Emergency Management Agency (FEMA) promulgated or extended rules to mitigate or address the COVID–19 pandemic. On December 13, 2021, DOS issued a temporary final rule, Waiver of Personal Appearance and In-Person Oath Requirement for Certain Immigrant Visa Applicants Due to COVID–19, which provides flexibility for consular officers to waive the personal appearance of certain repeat immigrant visa applicants. DOS made the temporary final rule effective for 24 months based upon the belief that after 24 months the pandemic will be less acute and ordinary travel resumes.[44] On April 10, 2020, FEMA published a temporary final rule allocating certain health and medical resources for domestic use, so that these resources may not be exported from the United States without explicit approval by FEMA.[45] Citing the spread of COVID–19 and the resulting strain on the country's healthcare systems, FEMA explained the measures described in the rule were imperative and necessary to respond to the pandemic.[46] FEMA's original temporary final rule was extended on August 10, 2020, and then extended again on December 31, 2020, until June 30, 2021.[47]

DHS is publishing this third extension as a temporary final rule because of the continuing COVID–19 pandemic and incorporates into this extension the discussion of good cause from the original temporary final rule and its extensions. As discussed earlier in this preamble, effective January 14, 2022, the Secretary of HHS renewed the determination that ''a public health emergency exists and has existed since January 27, 2020 nationwide.'' [48] On February 18, 2022, the President issued a notice on the continuation of the state of the National Emergency concerning the COVID–19 pandemic.[49]

As of March 4, 2022, there have been over 440 million confirmed cases of COVID–19 identified globally, resulting in more than 5.9 million deaths.[50] Approximately 78,428,884 cases have been identified in the United States, with about 242,345 new cases identified in the 7 days preceding February 28, 2022, and approximately 947,625 reported deaths due to the disease.[51] Additionally, CDC is monitoring several variants of the virus that causes COVID–19.[52] Evidence suggests that some variants may spread faster and more easily than others and at least one variant may be associated with an increased risk of severe illness.[53] Although vaccines are widely accessible, there is wide disparity in the percentages of vaccinated individuals by state.[54]

Ongoing research demonstrates that while there is high effectiveness of approved vaccines among eligible individuals, fully vaccinated individuals continue to experience breakthrough COVID–19 infections and may be either symptomatic or asymptomatic.[55] Nevertheless, CDC reports show that individuals who are unvaccinated have a greater risk of testing positive for COVID–19 and a greater risk of dying from COVID–19 than individuals who are fully vaccinated.[56] Given the continuing national emergency caused by COVID–19, there are still urgent and compelling circumstances to extend and continue this temporary final rule. USCIS cannot predict when the pandemic will end and believes that it is necessary to extend and continue this temporary final rule for another 365 days or until conditions improve and the health concerns posed by COVID–19 are mitigated to such a degree that these safety efforts are no longer necessary.

Throughout the COVID–19 pandemic, USCIS has continued to experience an increase in the affirmative asylum caseload, which, in turn, has created challenges in accommodating the interpretation needs of asylum applicants. Surges in other case types have also required USCIS to divert contract interpreter resources away from affirmative asylum. The increases continue presenting challenges to the agency and thus require USCIS to keep these procedures in place for an additional 365 days.

For the reasons stated, including the need to be responsive to the operational demands and challenges caused by the ongoing COVID–19 pandemic, DHS believes it has good cause to determine that ordinary notice and comment procedure is impracticable for this temporary action, and that moving expeditiously to make this change is in the best interest of the public.

Based on the continuing health emergency, USCIS continues to implement mitigation measures,[57] and concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this temporary final rule extension. Delaying implementation of this rule until the conclusion of notice-and-comment procedures and the 30-day delayed effective date would be impracticable and contrary to the public interest due to the need to continue agency operations, while continuing to mitigate the risks associated with the spread of COVID–19.

As of March 7, 2022, USCIS had 440,185 asylum applications, on behalf of 690,172 noncitizens, pending final adjudication. Ninety-five percent of these pending applications are awaiting an interview by an asylum officer. The USCIS backlog will continue to increase at a faster pace if USCIS is unable to safely and efficiently conduct asylum interviews.[58]

This temporary final rule extension is promulgated as a response to COVID–19 and emerging variants. It is temporary, limited in application to only those asylum applicants who cannot proceed with the interview in English, and narrowly tailored to mitigate the spread

certain H2–A Caribbean agricultural workers to avoid ''an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule''); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 02, 2003) (interim rule claiming the good cause exception for suspending certain automatic registration requirements for nonimmigrants because ''without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews'' over a six-month period).

[43] *See, e.g.,* Temporary Changes to Requirements Affecting H–2A Nonimmigrants Due To the COVID–19 National Emergency: Partial Extension of Certain Flexibilities, 85 FR 51304 (Aug. 20, 2020) (temporary final rule extending April 20, 2020 temporary final rule); CDC, Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID–19, 86 FR 34010 (July 01, 2021) (extension order).

[44] *See* 86 FR 70735.

[45] *See* 85 FR 48113 (Aug. 10, 2020) and 85 FR 20195 (Dec. 31, 2020), respectively.

[46] *Id.*

[47] *See* 85 FR 86835.

[48] HHS, Renewal of Determination That A Public Health Emergency Exists; Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic; Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak.

[49] *See* 87 FR 10289.

[50] WHO Coronavirus (COVID–19) Dashboard.

[51] *Id.*

[52] CDC, SARS–CoV–2 Variant Classifications and Definitions.

[53] CDC, What You Need to Know About Variants.

[54] CDC, COVID Data Tracker—COVID–19 Vaccinations in the United States.

[55] CDC, The Possibility of COVID–19 after Vaccination: Breakthrough Infections.

[56] CDC, Rate of COVID–19 Cases and Deaths by Vaccination Status.

[57] *See* USCIS Response to COVID–19.

[58] DHS recognizes that the backlog has increased since the original temporary final rule was extended; however, if all applicants were required to bring their own interpreter as was done pre-COVID–19, the interpreter may have to sit in a separate office during the interview to mitigate potential COVID–19 exposure, thereby reducing available office space to schedule additional interviews in a safe manner. This would likely increase the backlog at a faster rate than under this rule.

of COVID–19. To not extend such a measure could cause serious and far-reaching public safety and health effects.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

This temporary final rule extension will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined that this action is not a major rule as defined by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act). 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Order 12866 and Executive Order 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is designated a significant regulatory action under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. DHS, however, is proceeding under the emergency provision of Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously during the current public health emergency.

This action will continue to help asylum applicants proceed with their interviews in a safe manner, while protecting agency staff throughout the next year or until the health concerns posed by COVID–19 are resolved. As a result of the temporary final rule and subsequent extensions, USCIS has conducted 32,012 total asylum interviews between September 23, 2020 and March 7, 2022. This third extension is not expected to result in any additional costs to the government. In addition, even with the provision that permits, at USCIS' discretion, an applicant for asylum to provide an interpreter when a contract interpreter is unavailable, there are no additional costs to the applicant relative to what would be the requirements if the temporary final rule were not extended. In those limited circumstances, the interpreter will still be required to follow USCIS COVID–19 protocols in place at the time of the interview, including, but not limited to, sitting in a separate office. Following those COVID–19 protocols will not result in any additional costs for either the applicant or the interpreter.

Such contract interpreters will continue to be provided at no cost to the applicant. USCIS has an existing contract to provide telephonic interpretation and monitoring in interviews for all of its case types. USCIS has provided contract monitors for many years at interviews where the applicant brings an interpreter. In other words, almost all interviews that utilize a USCIS provided interpreter under this temporary final rule would have required instead a contracted monitor during asylum interviews conducted pre-pandemic. Additionally, the cost of monitoring and interpretation are identical under the current contract and monitors are no longer needed for interviews conducted through a USCIS-provided contract interpreter. Therefore, the continued extension of the temporary final rule is projected to be cost neutral or negligible for the government because USCIS is already paying for these services even without this rule.

In the limited circumstances where a contract interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter. In such cases, the applicant would be in the same position they would have been without this action.

DHS recognizes there are both quantitative and qualitative benefits that could be realized by providing an applicant for asylum the opportunity to bring their own interpreter when a contract interpreter is unavailable, such as the costs avoided that would otherwise be incurred due to rescheduling if a contract interpreter is unavailable—both for the applicant and USCIS—and the overall positive effect on applicants of having their asylum application timely adjudicated. Once this rule is no longer in effect, asylum applicants unable to proceed with an affirmative asylum interview before a USCIS asylum officer in English will again be required to provide their own interpreters under 8 CFR 208.9(g).

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. As this would only span 365 days, USCIS does not anticipate a need to update the Form I–589, Application for Asylum and for Withholding of Removal, despite the existing language on the form instructions regarding interpreters. USCIS will continue to post updates on its Form I–589 website, *https://www.uscis.gov/i-589,* and other asylum and relevant web pages regarding the interview requirements in this regulation, as well as provide personal notice to applicants via the interview

notices issued to applicants prior to their interview.

List of Subjects in 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2; Pub. L. 115–218.

■ 2. Effective from March 16, 2022 through March 16, 2023, amend § 208.9 by revising paragraph (h) introductory text to read as follows:

§ 208.9 Procedure for interview before an asylum officer.

* * * * *

(h) *Asylum applicant interpreters.* For asylum interviews conducted between March 16, 2022, through March 16, 2023:

* * * * *

Alejandro Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2022–05636 Filed 3–15–22; 8:45 am]

BILLING CODE 9111–97–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1238

[No. 2022–N–3]

Orders: Reporting by Regulated Entities of Stress Testing Results as of December 31, 2021; Summary Instructions and Guidance

AGENCY: Federal Housing Finance Agency.

ACTION: Orders.

SUMMARY: In this document, the Federal Housing Finance Agency (FHFA) provides notice that it issued Orders, dated March 10, 2022, with respect to stress test reporting as of December 31, 2021, under section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), as amended by section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). Summary Instructions and Guidance accompanied the Orders to provide testing scenarios.

DATES: Each Order is applicable March 10, 2022.

FOR FURTHER INFORMATION CONTACT: Andrew Varrieur, Acting Senior Associate Director, Office of Capital Policy, (202) 649–3141, *Andrew.Varrier@fha.gov;* Karen Heidel, Assistant General Counsel, Office of General Counsel, (202) 649–3073, *Karen.Heidel@fhfa.gov;* or Mark D. Laponsky, Deputy General Counsel, Office of General Counsel, (202) 649–3054, *Mark.Laponsky@fhfa.gov.* For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

I. Background

FHFA is responsible for ensuring that the regulated entities operate in a safe and sound manner, including the maintenance of adequate capital and internal controls, that their operations and activities foster liquid, efficient, competitive, and resilient national housing finance markets, and that they carry out their public policy missions through authorized activities. *See* 12 U.S.C. 4513. These Orders are being issued under 12 U.S.C. 4516(a), which authorizes the Director of FHFA to require by Order that the regulated entities submit regular or special reports to FHFA and establishes remedies and procedures for failing to make reports required by Order. The Orders, through the accompanying Summary Instructions and Guidance, prescribe for the regulated entities the scenarios to be used for stress testing. The Summary Instructions and Guidance also provides to the regulated entities advice concerning the content and format of reports required by the Orders and the rule.

II. Orders, Summary Instructions and Guidance

For the convenience of the affected parties and the public, the text of the Orders follows below in its entirety. The Orders and Summary Instructions and Guidance are also available for public inspection and copying at the Federal Housing Finance Agency's Freedom of Information Act (FOIA) Reading Room at *https://www.fhfa.gov/AboutUs/FOIAPrivacy/Pages/Reading-Room.aspx* by clicking on ''Click here to view Orders'' under the Final Opinions and Orders heading. You may also access these documents at *http://www.fhfa.gov/SupervisionRegulation/DoddFrankActStressTests.*

The text of the Orders is as follows:

Federal Housing Finance Agency

Order Nos. 2022–OR–FNMA–1 and 2022–OR–FHLMC–1

Reporting by Regulated Entities of Stress Testing Results as of December 31, 2021

Whereas, section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), as amended by section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (''EGRRCPA'') requires certain financial companies with total consolidated assets of more than $250 billion, and which are regulated by a primary Federal financial regulatory agency, to conduct periodic stress tests to determine whether the companies have the capital necessary to absorb losses as a result of severely adverse economic conditions;

Whereas, FHFA's rule implementing section 165(i)(2) of the Dodd-Frank Act, as amended by section 401 of EGRRCPA is codified as 12 CFR 1238 and requires that ''[e]ach Enterprise must file a report in the manner and form established by FHFA.'' 12 CFR 1238.5(b);

Whereas, The Board of Governors of the Federal Reserve System issued stress testing scenarios on February 10, 2022; and

Whereas, section 1314 of the Safety and Soundness Act, 12 U.S.C. 4514(a) authorizes the Director of FHFA to require regulated entities, by general or specific order, to submit such reports on their management, activities, and operation as the Director considers appropriate.

Now therefore, it is hereby Ordered as follows:

Each Enterprise shall report to FHFA and to the Board of Governors of the Federal Reserve System the results of the stress testing as required by 12 CFR 1238, in the form and with the content described therein and in the Summary Instructions and Guidance, with Appendices 1 through 7 thereto, accompanying this Order and dated March 10, 2022.

It is so ordered, this the 10th day of March, 2022.

This Order is effective immediately.

Signed at Washington, DC, this 10th day of March, 2022.

Sandra L. Thompson,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2022–05437 Filed 3–15–22; 8:45 am]

BILLING CODE 8070–01–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1240

RIN 2590–AB17

Enterprise Regulatory Capital Framework—Prescribed Leverage Buffer Amount and Credit Risk Transfer

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA or the Agency) is adopting a final rule (final rule) that amends the Enterprise Regulatory Capital Framework (ERCF) by refining the prescribed leverage buffer amount (PLBA or leverage buffer) and credit risk transfer (CRT) securitization framework for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac, and with Fannie Mae, each an Enterprise). The final rule also makes technical corrections to various provisions of the ERCF that was published on December 17, 2020.

DATES: This rule is effective May 16, 2022.

FOR FURTHER INFORMATION CONTACT: Andrew Varrieur, Senior Associate Director, Office of Capital Policy, (202) 649–3141, *Andrew.Varrieur@fhfa.gov;* Christopher Vincent, Senior Financial Analyst, Office of Capital Policy, (202) 649–3685, *Christopher.Vincent@fhfa.gov;* or Ming-Yuen Meyer-Fong, Associate General Counsel, Office of General Counsel, (202) 649–3078, *Ming-Yuen.Meyer-Fong@fhfa.gov.* These are not toll-free numbers. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

On September 27, 2021, FHFA published in the **Federal Register** a notice of proposed rulemaking (proposed rule) seeking comments on amendments to the ERCF that would refine the leverage buffer and the risk-based capital treatment for retained CRT exposures.[1] FHFA proposed these amendments to ensure that the ERCF appropriately reflects the risks inherent to the Enterprises' business models and contains proper incentives for the Enterprises to distribute acquired credit risk to private investors rather than to buy and hold that risk. In meeting these objectives, the proposed amendments would help restore FHFA's intended paradigm of having the Enterprises' leverage capital requirements and buffer provide a credible backstop to their risk-based capital requirements and buffers, enhancing the safety and soundness of the Enterprises. FHFA is now adopting in this final rule the proposed amendments, substantially as proposed.

FHFA published the ERCF on December 17, 2020[2] with the purpose of implementing a going-concern regulatory capital standard to ensure that each Enterprise operates in a safe and sound manner and is positioned to fulfill its statutory mission to provide stability and ongoing assistance to the secondary mortgage market across the economic cycle.[3] The ERCF, which became effective on February 16, 2021, aimed to address issues that arose during the notice and comment period such as the pro-cyclicality of the single-family risk-based capital requirements, the quality of Enterprise capital used to meet the capital requirements, and the quantity of required capital at the Enterprises. Accordingly, the ERCF is significantly stronger than the statutory framework which governed the Enterprises' capital requirements prior to entering conservatorships.

However, after finalizing the ERCF, FHFA identified specific aspects of the framework that might incentivize risk taking in certain economic environments and create disincentives to the Enterprises' CRT programs. Together, these features of the ERCF could result in an excessive buildup of risk accruing to taxpayers and the housing finance market, particularly because the Enterprises presently are severely undercapitalized and lack the resources on their own to safely absorb the credit risk associated with their normal operations.

FHFA views the transfer of risk, particularly credit risk, to a broad set of investors as an important tool to reduce taxpayer exposure to the risks posed by the Enterprises and to mitigate systemic risk caused by the size and monoline nature of the Enterprises' businesses. Since their development began in 2013, the CRT programs have been the Enterprises' primary mechanism to successfully effectuate reliable risk transfer to the private sector. Through these programs, the Enterprises have shed a significant amount of credit risk to help protect against potential losses while the PSPAs have significantly limited the Enterprises' ability to hold capital and withstand losses through normal operations. During this current period where the Enterprises are building capital, CRT remains an important risk mitigation tool to protect taxpayers against the heightened risk of potential PSPA draws in the event of a significant stress to the housing sector. It is therefore crucial that the Enterprises' capital requirements are appropriately sized, where the leverage capital framework is a credible backstop to the risk-based capital framework and where responsible and effective risk transfer is not unduly discouraged.

II. Overview of the Final Rule

A. Amendments to the ERCF

After carefully considering the comments on the proposed rule, and as described in this preamble, FHFA is adopting, substantially as proposed, amendments to the leverage buffer and risk-based capital treatment of CRT exposures. FHFA continues to believe that the amendments in this final rule will lessen the potential deterrents to Enterprise risk transfer by properly aligning incentives in the ERCF and will position the Enterprises to operate in a

[1] 86 FR 53230.

[2] 85 FR 82150.

[3] In conservatorships, the Enterprises are supported by Senior Preferred Stock Purchase Agreements (PSPAs) between the U.S. Department of the Treasury (Treasury) and each Enterprise, through FHFA as its conservator (Fannie Mae's Amended and Restated Senior Preferred Stock Purchase Agreement with Treasury (September 26, 2008), *https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FNM/SPSPA-amends/FNM-Amend-and-Restated-SPSPA_09-26-2008.pdf;* Freddie Mac's Amended and Restated Senior Preferred Stock Purchase Agreement with Treasury (September 26, 2008), *https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FRE/SPSPA-amends/FRE-Amended-and-Restated-SPSPA_09-26-2008.pdf*). The PSPAs, as amended by letter agreements executed by the parties on January 14, 2021 (2021 Fannie Mae Letter Agreement, *https://home.treasury.gov/system/files/136/Executed-Letter-Agreement-for-Fannie-Mae.pdf;* 2021 Freddie Mac Letter Agreement, *https://home.treasury.gov/system/files/136/Executed-Letter-Agreement-for-Freddie%20Mac.pdf*), include a covenant at section 5.15 which states: ''[The Enterprise] shall comply with the Enterprise Regulatory Capital Framework [published in the **Federal Register** at 85 FR 82150 on December 17, 2020] disregarding any subsequent amendment or other modifications to that rule.'' Modifying that covenant will require agreement between the Treasury and FHFA under section 6.3 of the PSPAs.

safe and sound manner to fulfill their statutory mission throughout the economic cycle, both during and after conservatorships. Specifically, the final rule will:

- Replace the fixed leverage buffer equal to 1.5 percent of an Enterprise's adjusted total assets with a dynamic leverage buffer equal to 50 percent of the Enterprise's stability capital buffer as calculated in accordance with 12 CFR 1240.400;
- Replace the prudential floor of 10 percent on the risk weight assigned to any retained CRT exposure with a prudential floor of 5 percent on the risk weight assigned to any retained CRT exposure; and
- Remove the requirement that an Enterprise must apply an overall effectiveness adjustment to its retained CRT exposures in accordance with 12 CFR 1240.44(f) and (i).

In addition, the final rule will implement technical corrections to various provisions of the ERCF that was published on December 17, 2020, highlighted by a significant typographical error in the definition of the long-term HPI trend that constitutes the basis for calculating the single-family countercyclical adjustment.

B. Effective Date

Under the rule published on December 17, 2020 establishing the ERCF, an Enterprise will not be subject to any requirement in the ERCF until the compliance date for the requirement as detailed in the ERCF. The effective date for the ERCF was February 16, 2021. The effective date for the ERCF amendments and technical corrections in this final rule will be 60 days after the day of publication of this final rule in the **Federal Register**.

III. General Comments on the Proposed Rule

FHFA received 89 public comment letters on the proposed rule from a variety of interested parties, including private individuals, trade associations, consumer advocacy groups, think-tanks and institutes, and financial institutions.[4] In general, and as discussed in greater detail below in the relevant sections of this preamble, commenters were supportive of FHFA's proposed amendments to both the leverage buffer and the risk-based capital treatment of retained CRT exposures. Overall, most commenters supported FHFA's efforts to restore the intended paradigm between leverage capital and risk-based capital at the Enterprises and to properly incentivize risk transfer within the ERCF. However, as discussed in the relevant sections of this preamble, FHFA also received a number of comments indicating concern over various aspects of the proposed amendments.

Over half of the 89 comments FHFA received during this notice and comment period focused on issues not directly related to the proposed amendments or technical corrections. In these letters, commenters offered views on important topics such as loan-level pricing adjustments, incorporating guarantee fees into capital requirements, the ERCF grids and risk multipliers, the magnitude of single-family and multifamily risk weights, various other aspects of the CRT securitization framework, the costs of CRT transactions, and the overall complexity of the ERCF, among others. In addition, commenters offered views on housing finance reform and on matters relating to the Enterprises' conservatorships, including issues related to the Enterprises' consent to conservatorships in 2008, subsequent actions by FHFA or the U.S. Department of the Treasury (Treasury), the magnitude of funds remitted to Treasury by the Enterprises relative to cumulative draws, Treasury's financial interests in the Enterprises, and the PSPAs. FHFA acknowledges the importance of these topics and will thoroughly consider the public's feedback on these issues when relevant rulemakings and policy decisions are under consideration.

In addition to soliciting comments on the proposed amendments and technical corrections, FHFA also sought feedback on two additional topics related to the ERCF: The 20 percent risk weight floor on single-family and multifamily mortgage exposures and potential options for a countercyclical adjustment for multifamily mortgage exposures. FHFA received feedback on both topics.

A. 20 Percent Risk Weight Floor

FHFA asked the public whether, in light of the proposed changes to the leverage buffer and the risk-based capital requirements for retained CRT exposures, the prudential risk weight floor of 20 percent on single-family and multifamily mortgage exposures was appropriately calibrated. FHFA did not propose a change to the risk weight floor on single-family and multifamily mortgage exposures. Nine commenters provided feedback on this question, and the opinions expressed by commenters were varied.

Some commenters recommended reducing or eliminating the 20 percent risk weight floor. Among these commenters, some suggested that lowering the floor is appropriate due to the Enterprises' improved balance sheets and mortgage lending standards relative to pre-crisis economics. Others suggested that the 20 percent risk weight floor in the ERCF is not appropriately calibrated. Another commenter suggested that the 20 percent floor distorts market signals about risk and incentivizes risk taking by the Enterprises.

Conversely, some commenters recommended maintaining the 20 percent risk weight floor. Among these commenters, some suggested that such a floor is prudent to ensuring the safety and soundness of the Enterprises. One commenter suggested that the risk weight floor is useful as an incentive for the Enterprises to transfer credit risk on lower-risk exposures. Another commenter suggested that the risk weight floor is important to mitigate the model risks inherent in the risk-sensitive methodology FHFA used to calibrate risk weights for mortgage exposures. One commenter suggested that reducing this risk weight floor could significantly increase the gap between the credit risk capital requirements of the Enterprises and other market participants.

One of the key objectives FHFA cited for proposing amendments to the ERCF was to ensure the leverage capital framework was a credible backstop to the risk-based capital framework. Despite changes to the 2020 ERCF proposed rule[5] that increased risk-based capital under the 2020 ERCF final rule, including raising the 15 percent risk weight floor on single-family and multifamily mortgage exposures to 20 percent and changing the dataset on which the single-family countercyclical adjustment is calculated, tier 1 leverage capital remains greater than tier 1 risk-based capital at each Enterprise in the absence of the leverage buffer and CRT amendments in the proposed rule. Should FHFA materially reduce the 20 percent floor on single-family and multifamily mortgage exposures without taking additional action, the likelihood that the leverage framework would once again be the binding capital constraint for the Enterprises would significantly increase. For this reason, and given the commenters' diverse feedback, FHFA has determined not to take action related to the 20 percent risk weight

[4] *See* comments on Amendments to the Enterprise Regulatory Capital Framework Rule—Prescribed Leverage Buffer Amount and Credit Risk Transfer, available at *https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Comment-List.aspx?RuleID=708.* The comment period for the proposed rule closed on November 26, 2021.

[5] 85 FR 39274.

floor on single-family and multifamily mortgage exposures at this time.

B. Multifamily Countercyclical Adjustment

FHFA also asked the public to recommend an approach for mitigating the pro-cyclicality of the credit risk capital requirements for multifamily mortgage exposures that relies only on non-proprietary data or indices. Eight commenters provided feedback on this question, recommending three different types of approach. The first group of commenters suggested solutions following the same principles as FHFA's single-family countercyclical adjustment, where risk attributes such as the loan-to-value (LTV) ratio would be adjusted up or down depending on deviations from a long-term trend. For use in this approach, commenters recommended FHFA consider the property index published by the National Council of Real Estate Investment Fiduciaries (NCREIF), long-term vacancy rates, long-term property value and income growth rates, and adjusted cap rates. The second group of commenters recommended FHFA consider an approach where the countercyclical adjustment is based on ratios of index peaks to current values. Commenters suggested FHFA could use the NCREIF property index for property values and Enterprise investor reporting for net operating income (NOI). This approach would assume that the multifamily risk weights already account for a 35 percent shock to property values and a 15 percent shock to NOI, so an adjustment would be made only to the extent that the property value and/or NOI index ratios suggest a further adjustment is necessary. Finally, one commenter suggested that FHFA should address pro-cyclicality for multifamily mortgage exposures by replacing mark-to-market LTV with original LTV and mark-to-market debt service coverage ratio (DSCR) with original DSCR.

FHFA appreciates the public's feedback on this topic and is committed to addressing the pro-cyclicality in the capital required for multifamily mortgage exposures. However, given the complexity of potential solutions and the diversity of suggestions provided by commenters, FHFA has determined that this topic requires further consideration, potentially in a future rulemaking. Therefore, FHFA has determined not to take action related to a multifamily countercyclical adjustment at this time.

IV. Leverage Buffer

The proposed rule would amend the ERCF by replacing the fixed tier 1 capital leverage buffer equal to 1.5 percent of an Enterprise's adjusted total assets with a dynamic tier 1 capital leverage buffer equal to 50 percent of the Enterprise's stability capital buffer.[6] In the proposed rule, FHFA presented several benefits to this approach.

First, a properly calibrated leverage ratio requirement and leverage buffer are critical aspects of a sound regulatory capital framework. The purpose of leverage capital is to promote financial stability by establishing a robust capital floor that persists throughout the economic cycle and by limiting risk taking when risk-based capital may otherwise fall to unduly low levels. Recalibrating the 1.5 percent leverage buffer will promote safety and soundness and financial stability at the Enterprises by lessening the likelihood that leverage capital will drive Enterprise decision-making in the majority of economic environments and reduce the frequency in which an Enterprise has an incentive to take on more risk in a capital optimization strategy. Furthermore, restoring leverage capital to a position of a credible backstop will allow other aspects of the ERCF, namely the risk-based capital requirements, including the single-family countercyclical adjustment, to work as intended. Second, the proposed leverage buffer amendment will encourage the Enterprises to transfer risk rather than to buy and hold risk. Third, a leverage framework with a dynamic buffer that grows and shrinks as an Enterprise grows and shrinks, respectively, will function as a better backstop to a risk-based capital framework that includes a stability capital buffer linked to an Enterprise's size. And fourth, a dynamic leverage buffer that is tied to the stability capital buffer will further align the ERCF with Basel III standards. Internationally, under the latest Basel framework adopted by the Bank for International Settlements, global systemically important banks (G–SIBs) are required to hold a leverage buffer equal to 50 percent of their higher loss-absorbency risk-based requirements—a measure akin to the G–SIB surcharge in the U.S. banking framework—to tailor an institution's leverage ratio to its business activities and risk profile.

The vast majority of comments FHFA received supported decreasing the tier 1 capital leverage buffer from a fixed 1.5 percent of adjusted total assets. Many commenters supported FHFA's proposed approach, while some supported decreasing the leverage buffer without tying it to the stability capital buffer and others favored eliminating the leverage buffer altogether.

Many commenters who recommended decreasing the leverage buffer suggested doing so because it is preferrable for risk-based capital metrics to be the binding capital constraint more frequently than non-risk-based capital floors such as leverage. Commenters suggested that this paradigm helps eliminate incentives for the Enterprises to increase risk taking and risk retention while providing flexibility to the Enterprises as they manage risk and rebuild robust levels of capital. In addition, commenters agreed with FHFA that a smaller leverage buffer would encourage the transfer of mortgage credit risk from the Enterprises to private investors. Another commenter stated that the 1.5 percent leverage buffer is unnecessary relative to the Enterprises' recent stress test results, and that such a high buffer would likely be excessive to the point of impairing the Enterprises' ability to support the market and meet their mission.

Many commenters expressed their general support for FHFA's proposed approach of tying the leverage buffer to the stability capital buffer. Commenters contended that a dynamic leverage buffer that expands and contracts with an Enterprise as its size and strategy evolve would more accurately reflect the Enterprise's risk and thereby help facilitate the Enterprises' ability to carry out their missions through all economic cycles. Thus, commenters reasoned that the proposed approach would help leverage serve as a credible backstop to the risk-based capital framework and allow the Enterprises to withstand losses in excess of those experienced during the great financial crisis. Other commenters supported FHFA's effort to move toward a dynamic leverage buffer to better reflect the spirit and intent of the leverage ratio, and also because dynamic buffers have proven to be an effective tool for managing capital at the global systemically important banks. Another commenter suggested that the proposed approach will help provide stability in the mortgage market and increase investor confidence in the Enterprises and overall economy throughout the economic cycle, helping stave off the need for emergency taxpayer intervention. Another commenter stated that basing the leverage buffer on a risk-based capital metric is preferrable because it better reflects the varying levels of risk within an Enterprise's particular pool of total assets.

Some commenters expressed more reserved support for setting the leverage buffer equal to 50 percent of the stability

[6] 12 CFR 1240.400.

capital buffer. Several commenters expressed concern that tying the leverage buffer to the stability capital buffer could have pro-cyclical implications in the sense that an Enterprise's market share tends to grow during a stress when other market participants are growing slowly or shrinking. Thus, requiring an Enterprise to increase its leverage buffer during the period when the Enterprise is fulfilling its countercyclical role could limit the Enterprise's ability to supply market liquidity when it is most needed. In contrast to these commenters' concern, FHFA anticipates that setting the leverage buffer equal to 50 percent of the stability capital buffer will actually reduce the pro-cyclicality of the leverage framework because increases to an Enterprise's adjusted total assets are reflected in the fixed 1.5 percent leverage buffer immediately whereas increases to an Enterprise's share of the overall mortgage market are reflected in the stability capital buffer with up to a two-year delay.[7] FHFA believes this delayed need to raise capital relative to the current ERCF will facilitate the Enterprises' abilities to provide liquidity to the mortgage market during a stress, even if an Enterprise grows its portfolio as a result of fulfilling its countercyclical mission.

A few other commenters supported FHFA's proposed amendments but recommended that FHFA: i. Continue to study the relationship between leverage, risk-based capital, and the stability capital buffer to determine definitively that the leverage buffer should be linked to the stability capital buffer; and ii. provide historical data affirming the proposed approach and demonstrating that under the proposed amendments leverage will rarely exceed risk-based capital.

Another commenter recommended that FHFA must ensure that its regulatory capital framework avoids discriminatory outcomes and promotes equitable treatment of borrowers and communities of color. One commenter supported FHFA's proposed amendments but expressed a desire for FHFA to be more anticipatory and expansive in the list of provisions it chooses to reconsider.

Some commenters recommended decreasing the leverage buffer but not tying it to the stability capital buffer. One commenter expressed concern that the stability capital buffer was itself arbitrarily determined, so by association a leverage buffer equal to 50 percent of the stability capital buffer is also arbitrarily determined. This commenter recommended that FHFA consider alternative methods of the setting the leverage buffer that are more closely tied to an Enterprise's risk. One commenter recommended that FHFA decrease an Enterprise's leverage buffer by some estimate of future guarantee fees. Similarly, another commenter recommended that FHFA decrease an Enterprise's leverage buffer to reflect risk transferred through CRT in the same way that the risk-based capital framework provides capital relief for CRT. Several commenters recommended FHFA simply reduce the leverage buffer from 1.5 percent of adjusted total assets to a lower percentage of adjusted total assets, such as 0.5 percent, because market share is not a reasonable representation of Enterprise risk.

Some commenters recommended FHFA eliminate the leverage buffer completely. These commenters generally viewed the leverage buffer as not necessary for the leverage framework to be a credible backstop to the risk-based capital framework. Two commenters suggested the 2.5 percent leverage capital requirement is itself sufficient as a credible backstop to risk-based capital in the ERCF. Another commenter suggested the leverage buffer is unnecessary because: i. Stress losses on a new month of originations are lower than the capital required by the ERCF; and ii. future guarantee fees provide a significant source of claims-paying resources, which are not considered as a source of capital in the framework. One commenter suggested FHFA eliminate the leverage buffer rather than decrease it because a future FHFA director can just as easily increase it again.

Finally, some commenters recommended that FHFA maintain the fixed 1.5 percent leverage buffer. One commenter claimed that FHFA does not provide evidence that the existing ERCF leverage-based requirements would be binding throughout the economic cycle, and that it is difficult to envision any realistic scenario in which the proposed amendments to the leverage buffer would result in a leverage-based requirement that could exceed the risk-based requirement, violating the concept of being a credible backstop. FHFA disagrees with the premise of this argument because the argument compares tier 1 leverage capital to adjusted total risk-based capital, which includes tier 2 capital. When looking only at tier 1 capital, one can readily construct realistic scenarios where tier 1 risk-based capital at an Enterprise decreases due to a period of sustained house price appreciation such that tier 1 leverage capital exceeds tier 1 risk-based capital and therefore leverage becomes the binding capital constraint.

The commenter also suggests that FHFA fails to explain how the calibration of the 1.5 percent leverage buffer is flawed and how the proposed leverage buffer is analogous to the risk-weighted-asset-based Basel leverage buffer for international G–SIBs. In the proposed rule, FHFA discussed how the leverage framework unduly disincentivizes risk transfer predominately due to the outsized leverage buffer, and how a fixed leverage buffer may not concurrently be appropriate for both a large and a small Enterprise. FHFA views these characteristics as flaws in the calibration of the leverage buffer because the design could result in taxpayers bearing excessive undue risk for as long as the Enterprises are in conservatorships and excessive risk to the housing finance market both during and after conservatorships. In addition, FHFA discussed how the proposed leverage buffer is similar to the Basel leverage buffer in that both are derived from measures that attempt to quantify the amount of systemic risk posed by the Enterprises and G–SIBs, respectively—the stability capital buffer in the ERCF and the G–SIB surcharge in the Basel framework. There are, of course, structural differences between the two buffers in both derivation and application, as is appropriate given that the Enterprises and the other financial institutions have different business models.

Furthermore, two commenters noted that the Financial Stability Oversight Council's (FSOC) review of the 2020 ERCF proposed rule found that capital requirements ''that are materially less than those contemplated by [the proposed rule] would likely not adequately mitigate the potential stability risk posed by the Enterprises,'' and that the proposed rule would result in a material two-thirds reduction to the leverage buffer, increasing risks to taxpayers and financial stability. FHFA generally agrees with the findings presented in FSOC's activities-based review of the secondary mortgage market.[8] However, similar to approaches followed by other financial regulators, FHFA intends to periodically review the ERCF and adjust various elements as necessary to ensure the safety and soundness of the Enterprises so they can carry out their mission throughout the economic cycle. In addition, FHFA notes that Federal Reserve officials have publicly

[7] *Id.*

[8] *https://home.treasury.gov/news/press-releases/sm1136.*

identified binding leverage capital requirements under the Supplementary Leverage Ratio (SLR) framework as an important issue that must be addressed so that banks' incentives are not skewed to increase risk-taking. FHFA continues to agree with this guiding principle for the Enterprises under the ERCF.

The final rule adopts the dynamic tier 1 capital leverage buffer equal to 50 percent of the stability capital buffer as proposed. In consideration of the public comments on the proposed rule, FHFA continues to believe that such a leverage buffer determined in this manner will best position the Enterprises to fulfil their mission in a safe and sound manner throughout the economic cycle by ensuring that the leverage framework acts as a credible backstop to the risk-based capital framework and by encouraging the Enterprises to transfer credit risk rather than to buy and hold risk.

FHFA notes that the final rule will not change the tier 1 leverage capital requirement, which will remain at 2.5 percent of adjusted total assets. This requirement, plus other features of the ERCF such as the single-family countercyclical adjustment and the risk weight floor on single-family and multifamily mortgage exposures, will continue to mitigate the potential stability risk posed by the Enterprises and will ensure an Enterprise maintains robust capital even during the best economic conditions when risk-based capital requirements might fall due to significant house price appreciation.

In addition, FHFA continues to believe that the leverage buffer plays an important role in the ERCF, despite the recommendations of several commenters to eliminate the buffer. The leverage buffer represents a cushion above an Enterprise's 2.5 percent leverage ratio requirement that can be drawn down in a stress scenario without violating prompt corrective action, providing an Enterprise with flexibility to continue its normal operations without risk of breaching a requirement.

V. Credit Risk Transfer

The proposed rule would replace the prudential floor of 10 percent on the risk weight assigned to any retained CRT exposure with a prudential floor of 5 percent on the risk weight assigned to any retained CRT exposure and would remove the requirement that an Enterprise must apply an overall effectiveness adjustment to its retained CRT exposures.[9]

Many commenters expressed the view that CRT is an effective means by which to transfer risk to private markets, protect taxpayers, and stabilize the Enterprises and housing finance more generally. Consequently, the vast majority of comments FHFA received on the proposed amendments to the risk-based capital requirements for retained CRT exposures were generally supportive of the amendments. However, a minority of comments questioned the efficacy of CRT and noted that the amendments would weaken the Enterprises' financial resilience. Several other commenters offered broad critiques of and suggestions for the risk-based capital approach to CRT and the Enterprises' CRT programs more generally. While FHFA appreciates and considers all comments, the following discussion focuses on comments directly pertaining to the amendments put forward in the proposed rule.

CRT Risk Weight Floor

In the proposed rule, FHFA contended that amending the CRT risk weight floor was necessary for two reasons. First, the 10 percent floor on the risk weight assigned to a retained CRT exposure unduly decreases the capital relief provided by CRT and reduces an Enterprise's incentives to engage in risk transfer. This occurs in part because the aggregate credit risk capital required for a retained CRT exposure is often greater than the aggregate credit risk capital required for the underlying exposures, especially when the credit risk capital requirements on the underlying whole loans and guarantees are low or the CRT is seasoned. Second, the 10 percent risk weight floor discourages CRT through its duplicative nature. The operational criteria for CRT, which state that FHFA must approve each transaction as being effective in transferring the credit risk, as well as the Enterprises' own ability to mitigate unknown risks through their underwriting standards and servicing and loss mitigation programs, lessen the need for a tranche-level risk weight floor as high as 10 percent.

Commenters were generally very supportive of the proposed amendment to the CRT risk weight floor. Commenters suggested that reducing the risk weight floor on retained CRT exposures from 10 percent to 5 percent raises the regulatory value of risk transfer closer to its economic value. Commenters stated that the change would restore the incentive for the Enterprises to engage in CRT to disperse credit risk among private investors and thereby lessen the systemic risk posed by the Enterprises. Commenters also suggested that transferring credit risk away from the Enterprises strengthens their safety and soundness and supports the overall mortgage market, including by promoting greater private market participation without an adverse impact on affordability. Several commenters supported the 5 percent floor because it represents a more market-sensitive treatment of CRT and better aligns capital to risk. In this regard, one commenter suggested that unduly high capital requirements will hamper an Enterprise's ability to fulfill its statutory mission of facilitating loans to low-income and very low-income borrowers and communities. In addition, commenters suggested that the 5 percent floor would provide reasonable protection from model risk while maintaining a conservative discount to equity capital, which has flexibility and fungibility advantages.

Furthermore, several commenters recommended lowering the CRT risk weight floor below 5 percent or eliminating it altogether. Commenters suggested that the floor is not analytically supported and provides excessive protection against CRT-related risks. One commenter's analysis suggested that CRT requirements are too stringent even if the floor is removed and recommended that FHFA calibrate the risk-based capital requirements for retained CRT exposures to be consistent with the economics of CRT transactions.

A few commenters recommended rejecting the proposed amendment in favor of the 10 percent risk weight floor. Several commenters claimed that the proposed amendment weakens the financial resilience of the Enterprises. These commenters suggested that the amendments will increase leverage at the Enterprises which will increase insolvency risk, and that FHFA should not balance incentivizing CRT with safety and soundness when considering capital standards.

Some commenters generally supported FHFA's proposal to lower the CRT risk weight floor but offered alternatives to the 5 percent floor in the proposed rule. A few commenters recommended that FHFA apply the CRT risk weight floor on a sliding scale such that the risk weight floor decreases as credit risk becomes more remote. A few commenters suggested that the floor should reflect an exposure-level analysis and perhaps be functionally related to economic variables such as seasoning or house price appreciation. One commenter recommended removing the floor and using an econometric approach that requires capital above the risk-based capital amount and provides a marginal benefit

[9] 12 CFR 1240.44(f) and (i).

to risk reduction activities beyond stress loss.

The final rule adopts the prudential floor of 5 percent on the risk weight assigned to any retained CRT exposure as proposed. In consideration of the public comments on the proposed rule, FHFA continues to believe that a prudential risk weight of 5 percent sufficiently ensures the viability of CRTs while mitigating their safety and soundness, mission, and housing stability risks. The final rule does not eliminate the CRT risk weight floor, as recommended by some commenters, because the prudential floor for a retained CRT exposure avoids treating that exposure as posing no credit risk, which continues to be an important policy objective for FHFA. In addition, FHFA has determined to finalize the 5 percent risk weight floor as proposed rather than adopting one of the alternatives suggested by commenters in order to maintain consistency with other aspects of the CRT securitization framework that were designed with a static risk weight floor in mind.

Overall Effectiveness Adjustment

In the proposed rule, FHFA presented rationale for eliminating the overall effectiveness adjustment due to the duplicative nature of the adjustment within the risk-based capital requirements for retained CRT exposures. Unlike the counterparty and loss-timing effectiveness adjustments in the CRT securitization framework, the overall effectiveness adjustment does not target specific risks. Rather, similar to the risk weight floor on retained CRT exposures and the CRT operational criteria, the overall effectiveness adjustment was designed to address risks that are difficult to measure, such as model risk and the loss-absorbing benefits of equity capital relative to CRT. FHFA reasoned that, considering the additional elements of the CRT securitization framework that also target these difficult-to-measure risks, the overall effectiveness adjustment is duplicative and creates an unnecessary disincentive for the Enterprises to engage in CRT.

The vast majority of comments supported FHFA's proposed amendment to eliminate the overall effectiveness adjustment from the CRT securitization framework. Several commenters contended that the overall effectiveness adjustment was redundant and was not analytically supported. Commenters also reasoned that the proposed amendment produces a CRT treatment that better recognizes the risk reduction in CRT through improved CRT economics, provides appropriate incentives for the transfer of credit risk, and that even after removing the overall effectiveness adjustment, the capital relief provided by the framework is conservative. One commenter maintained that the overall effectiveness adjustment can be removed without sacrificing the Enterprises' safety and soundness. Multiple commenters suggested that the elimination of the overall effectiveness adjustment would encourage the Enterprises to disperse credit risk among investors rather than retaining that risk where taxpayers are ultimately liable, and that the proposed amendment would facilitate the Enterprises to carry out their mission throughout the economic cycle.

Several commenters supported keeping the overall effectiveness adjustment. These commenters contended that the proposal to eliminate the overall effectiveness adjustment further weakens the financial resilience of the Enterprises to withstand future credit losses that may occur during an economic stress and that FHFA should keep the adjustment because it accounts for differences in loss-absorbing capacity between CRT and equity capital. Several other commenters recommended FHFA keep the overall effectiveness adjustment in the CRT securitization framework, but their support for this aspect of the framework was conditional on either eliminating the CRT risk weight floor or making substantive reductions to the proposed risk weight floor.

The final rule adopts the removal of the overall effectiveness adjustment as proposed. In consideration of the public comments on the proposed rule, FHFA continues to believe that the overall effectiveness adjustment should be eliminated from the risk-based capital requirements for retained CRT exposures. FHFA believes that the risk weight floor, loss timing effectiveness adjustment, counterparty effectiveness adjustments, and CRT operational criteria, including FHFA's authority to review and approve CRT transactions as effective in transferring credit risk, sufficiently protect the Enterprises from the potential safety and soundness risks posed by CRT.

VI. ERCF Technical Corrections

The proposed rule would make technical corrections to the ERCF related to definitions, variable names, the single-family countercyclical adjustment, and CRT formulas that were not accurately reflected in the final rule published on December 17, 2020. These technical corrections would revise the ERCF for the following items:

- In § 1240.2, the definition of ''Multifamily mortgage exposure'' would be moved from its current location to a location that follows alphabetical order relative to the other definitions within the section. The definition of a multifamily mortgage exposure would not change.
- In § 1240.33, the definition of ''Long-term HPI trend'' would be updated to correct a typographical error that resulted in only the coefficient of the trendline formula, 0.66112295, being published. The corrected trendline formula would be $0.66112295e^{(0.002619948*t)}$. The Enterprises use the long-term HPI trend as the basis for calculating the single-family countercyclical adjustment. As published in the ERCF, the trendline would be a time-invariant horizontal line rather than a time-varying exponential function.
- In § 1240.33, the definition of OLTV for single-family mortgage exposures would be amended to include the parenthetical (*original loan-to-value*) after the acronym to provide additional clarity as to the meaning of OLTV. Single-family OLTV would continue to be based on the lesser of the appraised value and the sale price of the property securing the single-family mortgage.
- In § 1240.37, the second paragraph (d)(3)(iii) would be redesignated as (d)(3)(iv) to correct a typographical error.
- In § 1240.43(b)(1), the term ''KG'' would be replaced to correct a typographical error.
- In § 1240.44 we correct the following typographical errors:
  - In paragraph (b)(9)(i)(C), the term ''(*LTFUPB%*)'';
  - In paragraph (b)(9)(i)(D), the term ''LTF%'';
  - In paragraph (b)(9)(ii), the term ''*LTF%*'';
  - In paragraph (b)(9)(ii)(B), the term ''(*CRTF15%*)'';
  - In paragraph (b)(9)(ii)(C), the term ''(*CRT80NotF15%*)'';
  - In paragraph (b)(9)(ii)(E)(*2*)(*i*), the equation would be revised to correct typographical errors in the names of two variables within the equation;
  - In paragraph (b)(9)(ii)(E)(*2*)(*iii*), the term ''*LTF%*'';
  - In paragraph (c) introductory text, the term ''*RW%*'';
  - In paragraph (c)(1), the term ''*AggEL%*'';
  - In paragraph (g), the first three equations would be combined into one equation to correct a typographical error that erroneously split the equation into three distinct parts.

The final rule adopts the ERCF technical corrections as proposed.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) requires that regulations involving the collection of information receive clearance from the Office of Management and Budget (OMB). The final rule contains no such collection of information requiring OMB approval under the PRA. Therefore, no information has been submitted to OMB for review.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the final rule will not have a significant economic impact on a substantial number of small entities because the final rule is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

IX. Congressional Review Act

In accordance with the Congressional Review Act (5 U.S.C. 801 *et seq.*), FHFA has determined that this final rule is a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects for 12 CFR Part 1240

Capital, Credit, Enterprise, Investments, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the Preamble, under the authority of 12 U.S.C. 4511, 4513, 4513b, 4514, 4515–17, 4526, 4611–4612, 4631–36, FHFA amends part 1240 of Title 12 of the Code of Federal Regulation as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

SUBCHAPTER C—ENTERPRISES

PART 1240—CAPITAL ADEQUACY OF ENTERPRISES

■ 1. The authority citation for part 1240 is revised to read as follows:

Authority: 12 U.S.C. 4511, 4513, 4513b, 4514, 4515, 4517, 4526, 4611–4612, 4631–36.

■ 2. Amend § 1240.2 by removing the definition of ''Multifamily mortgage exposure'' and adding a new definition of ''Multifamily mortgage exposure'' in alphabetical order to read as follows:

§ 1240.2 Definitions.

* * * * *

Multifamily mortgage exposure means an exposure that is secured by a first or subsequent lien on a property with five or more residential units.

* * * * *

■ 3. Revise § 1240.11(a)(6) as follows:

§ 1240.11 Capital conservation buffer and leverage buffer.

(a) * * *

(6) *Prescribed leverage buffer amount.* An Enterprise's prescribed leverage buffer amount is 50 percent of the Enterprise's stability capital buffer calculated in accordance with subpart G of this part.

* * * * *

■ 4. Amend § 1240.33(a) by:

■ a. In the definition of ''Long-term HPI trend'', removing ''0.66112295'' and adding ''$0.66112295e^{(0.002619948*t)}$'' in its place; and

■ b. Revising the definition of ''OLTV''.

The revision reads as follows:

§ 1240.33 Single-family mortgage exposures.

(a) * * *

OLTV (original loan-to-value) means, with respect to a single-family mortgage exposure, the amount equal to:

(i) The unpaid principal balance of the single-family mortgage exposure at origination; divided by

(ii) The lesser of:

(A) The appraised value of the property securing the single-family mortgage exposure; and

(B) The sale price of the property securing the single-family mortgage exposure.

* * * * *

§ 1240.37 [Amended]

■ 5. Amend § 1240.37 by redesignating the second paragraph (d)(3)(iii) as (d)(3)(iv).

§ 1240.43 [Amended]

■ 6. Amend § 1240.43(b)(1) by removing the term ''KG'' and adding the term ''K_G'' in its place.

■ 7. Amend § 1240.44 by:

■ a. In paragraph (b)(9)(i)(C), removing the term ''(*LTFUPB%*)'' and adding the term ''(*LTFUPB*$_{\%}$)'' in its place;

■ b. In paragraph (b)(9)(i)(D), removing the term ''LTF%'' and adding the term ''*LTF*$_{\%}$'' in its place;

■ c. In paragraph (b)(9)(ii) introductory text removing the term ''*LTF%*'' and adding the term ''*LTF*$_{\%}$'' in its place;

■ d. In paragraph (b)(9)(ii)(B), removing the term ''(*CRTF15%*)'' and adding the term ''(*CRTF15*$_{\%}$)'' in its place;

■ e. In paragraph (b)(9)(ii)(C), removing the term ''(*CRT80NotF15%*)'' and adding the term ''(*CRT80NotF15*$_{\%}$)'' in its place;

■ f. Revising the equation in paragraph (b)(9)(ii)(E)(*2*)(*i*);

■ g. In paragraph (b)(9)(ii)(E)(*2*)(*iii*), removing the term ''*LTF%*'' and adding the term ''*LTF*$_{\%}$,'' in its place;

■ h. In paragraph (c) introductory text:

■ i. Removing the term ''*RW%*'' and adding the term ''*RW*$_{\%}$'' in its place; and

■ ii. Removing the term ''10 percent'' and adding the term ''5 percent'' in its place;

■ i. In paragraph (c)(1), removing the term ''*AggEL%*'' and adding the term ''*AggEL*$_{\%}$'' in its place;

■ j. In paragraphs (c)(2) and (c)(3)(ii), removing the term ''10 percent'' and adding the term ''5 percent'' in its place;

■ k. Revising the first equation in paragraph (d);

■ l. In paragraph (e), removing the term ''10 percent'' and adding the term ''5 percent'' in its place;

■ m. Revising paragraph (f)(2)(i);

■ n. In paragraph (g), revising the first three equations;

■ o. Revising the first equation in paragraph (h); and

■ p. Removing and reserving paragraph (i).

The revisions read as follows:

§ 1240.44 Credit risk transfer approach (CRTA).

* * * * *

(b) * * *

(9) * * *

(ii) * * *

(E) * * *

(*2*) * * *

(*i*) * * *

$$LTF_{\%} = (CRTLT15 * CRTF15_{\%}) + (CRTLT80Not15 * CRT80NotF15_{\%}) + \left(CRTLTGT80Not15 * (1 - CRT80NotF15_{\%} - CRTF15_{\%})\right)$$

* * * * *

(d) * * *

$$RW_{\%,Tranche} = \begin{cases} 1{,}250\% \; if \; K_A + AggEL_{\%} \geq D \\ 5\% \; if \; K_A + AggEL_{\%} \leq A \\ 1250\% * \left(\frac{K_A + AggEL_{\%} - A}{D - A}\right) + 5\% * \left(\frac{D - (K_A + AggEL_{\%})}{D - A}\right) \; if \; A < K_A + AggEL_{\%} < D \end{cases}$$

$$AggEL_{\%} = 100\% * \frac{EL_{\$}}{AggUPB_{\$}}$$

* * * * *

(f) * * *

(2) *Inputs*—(i) *Enterprise adjusted exposure.* The adjusted exposure (EAE) of an Enterprise with respect to a retained CRT exposure is as follows:

$$EAE_{\%,Tranche} = 100\% - \left(CM_{\%,Tranche} * LTEA_{\%,Tranche,CM}\right) - \left(LS_{\%,Tranche} * LSEA_{\%,Tranche} * LTEA_{\%,Tranche,LS}\right),$$

Where the loss timing effectiveness adjustments (LTEA) for a retained CRT exposure are determined under paragraph (g) of this section, and the loss sharing effectiveness adjustment (LSEA) for a retained CRT exposure is determined under paragraph (h) of this section.

* * * * *

(g) * * *

$$if \; \left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right) > 0 \; then$$

$$LTEA_{\%,Tranche,CM} = \frac{100\% * \max\left(0, \min\left(1, \; \frac{LTK_{A,CM} + AggEL_{\%} - A}{D - A}\right)\right) - ELS_{\%,Tranche}}{\left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right)}$$

$$LTEA_{\%,Tranche,LS} = \frac{100\% * \max\left(0, \min\left(1, \; \frac{LTK_{A,LS} + AggEL_{\%} - A}{D - A}\right)\right) - ELS_{\%,Tranche}}{\left(SLS_{\%,Tranche} - ELS_{\%,Tranche}\right)}$$

* * * * *

(h) * * *

$$if\ \left(RW_{\%,Tranche} - ELS_{\%,Tranche} * 1250\%\right) > 0\ then$$

$$LSEA_{\%,Tranche} = max\left(\left(1 - HC * \frac{\left(UnCollatUL_{\%,Tranche} * 1250\% + SRIF_{\%,Tranche} * 5\%\right)}{\left(RW_{\%,Tranche} - ELS_{\%,Tranche} * 1250\%\right)}\right), 0\%\right)$$

* * * * *

Sandra L. Thompson,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2022–04529 Filed 3–15–22; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1120; Project Identifier 2019–SW–056–AD; Amendment 39–21962; AD 2022–05–10]

RIN 2120–AA64

Airworthiness Directives; Goodrich Externally-Mounted Hoist Assemblies

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for various model helicopters with certain part-numbered Goodrich externally-mounted hoist assemblies (hoists) installed. This AD was prompted by hoists failing lower load limit inspections. This AD requires replacing unmodified hoists, installing placards, revising the existing Rotorcraft Flight Manual (RFM) for your helicopter, deactivating or removing a hoist if a partial peel out occurs, reviewing the helicopter's hoist slip load test records, repetitively inspecting the hoist cable and overload clutch (clutch), and reporting information to the manufacturer. This AD also requires establishing operating limitations on the hoist and prohibits installing an unmodified hoist. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 20, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of April 20, 2022.

ADDRESSES: For Goodrich service information identified in this final rule, contact Collins Aerospace; 2727 E Imperial Hwy., Brea, CA 92821; telephone (714) 984–1461; email *GHW@collins.com;* or at *https://www.collinsaerospace.com/*. You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1120.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1120; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the European Union Aviation Safety Agency (EASA) AD, any comments received, and other information. The street address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *kristin.bradley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to various model helicopters with certain part-numbered externally-mounted Goodrich hoists installed. The NPRM published in the **Federal Register** on December 11, 2020 (85 FR 79930). In the NPRM, the FAA proposed to require replacing unmodified hoists, installing placards, revising the existing RFM for your helicopter, deactivating or removing a hoist if a partial peel out occurs, reviewing the helicopter's hoist slip load test records, repetitively inspecting the hoist cable and clutch, and reporting information to the manufacturer. The NPRM was prompted by a series of EASA ADs, the most recent at that time being EASA AD 2015–0226R5, Revision 5, dated July 23, 2020 (EASA AD 2015–0226R5), to correct an unsafe condition for various model helicopters with a Goodrich externally-mounted hoist with one of the following part numbers (P/Ns) or base P/Ns installed: 42315, 42325, 44301–10–1, 44301–10–2, 44301–10–4, 44301–10–5, 44301–10–6, 44301–10–7, 44301–10–8, 44301–10–9, 44301–10–10, 44301–10–11, 44311, 44312, 44314, 44315, 44316, or 44318. EASA advised of an initial incident of a rescue hoist containing a dummy test load of 552 lbs. that reeled-out without command of the operator and impacted the ground during a maintenance check flight because the overload clutch had failed. EASA stated that this condition, if not detected and corrected, could lead to further cases of in-flight loss of the hoist load, possibly resulting in injury to persons on the ground or in a hoisting accident.

Accordingly, EASA AD 2015–0226R5 required a records review to determine if the cable had exceeded the allowable limit in previous load testing, a repetitive load check and test of the clutch slip value, removal or deactivation of a hoist that could not be tested due to lack of approved instructions, replacement of the old clutch P/N with a new clutch developed by Goodrich to mitigate some of the factors resulting in clutch degradation, periodic replacement of the hoist, reduction of the maximum allowable load on the hoist, addition of operational limitations to the RFM, and replacement of the hoist after a partial peel out. EASA AD 2015–0226R5 also prohibited the installation of a replacement cable that has exceeded the allowable limit in previous load testing. EASA considered AD 2015–0226R5 to be interim action and advised further AD action may follow.

The FAA issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 by adding an AD that would apply to various model helicopters with certain part-numbered externally-mounted Goodrich hoists installed. The SNPRM published in the **Federal Register** on September 30, 2021 (86 FR 54129). The SNPRM proposed to revise the NPRM by adding a figure and revising certain requirements, including changes to the temperatures in the

maximum hoist load limitations and adding the cost of a (field) load check tool. The SNPRM was prompted by changes from the public comments, which expanded the scope of the NPRM.

Although the NPRM and SNPRM discussed the unsafe condition as described by EASA in EASA AD 2015–0226R5, the FAA based most of the proposed requirements in both the NPRM and the SNPRM on service information issued by Goodrich for all helicopter models with an affected hoist. For the replacement intervals proposed in paragraph (g)(1) of the NPRM and SNPRM, the FAA based those actions on portions of the EASA AD that are not model specific.

Actions Since the SNPRM Was Issued

Since the FAA issued the SNPRM, EASA has revised EASA AD 2015–0226R5 and issued EASA AD 2015–0226R6, Revision 6, dated December 8, 2021, and corrected December 20, 2021 (EASA AD 2015–0226R6). EASA AD 2015–0226R6 adds a new helicopter model-specific replacement/overhaul interval for affected hoists with a new overload clutch. After reviewing the changes in EASA AD 2015–0226R6, the FAA has determined that no changes to this AD are necessary.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from Bell Textron Canada Limited (Bell Canada), Collins Aerospace, and Transport Canada. The following presents the comments received on the SNPRM and the FAA's response to each comment.

Request Regarding the Costs of Compliance

Collins Aerospace commented that two new potential costs could impact operators: Groundings from an inability to update the fleet and contract penalties for operational contracts requiring the use of a 600-lb rated hoist.

The cost analysis in AD rulemaking actions includes only the costs associated with complying with the AD, which does not include indirect costs such as down-time and loss of revenue.

Request To Change the AD for Bell Canada Model 429 and 430 Helicopters

Bell Canada and Transport Canada stated that, because Canada is the state of design for Model 429 and 430 helicopters, the FAA should review Transport Canada AD CF–2017–23, dated July 7, 2017 (Transport Canada AD CF–2017–23), and revise the FAA's proposed AD accordingly. The commenters stated that they discussed the corrective actions in Transport Canada AD CF–2017–23 and tailored its limitations and operating parameters specifically for Bell Canada Model 429 and 430 helicopters. Bell Canada stated that because the related EASA AD was issued unilaterally, the mitigations in Transport Canada AD CF–2017–23 are better suited for Model 429 and 430 helicopters than those in the EASA AD.

The FAA reviewed Transport Canada AD CF–2017–23, which is applicable to, and has some different requirements for, certain Bell Canada Model 429 and 430 helicopters. This FAA AD applies to affected Goodrich hoists, regardless of the model helicopter they are installed on, to address the risk to the fleet independent of the helicopter installation. Accordingly, the FAA based its AD on Goodrich's service information and not on any model-specific requirements. Operators may request approval of model-specific corrective actions as an alternative method of compliance (AMOC) under the provisions of paragraph (h) of this AD.

Request Regarding Compliance Time for Hoist Replacement

Collins Aerospace requested the FAA extend the compliance time for replacing an affected hoist with a hoist that has an improved overload clutch assembly from 12 months to 24 months. In support, Collins Aerospace stated 24 months is an acceptable time based on improved data from the initial load checks and subsequent checks with a load check tool. Additionally, Collins Aerospace stated it does not have the capacity to provide improved overload clutch assemblies for the entire fleet within 12 months.

The FAA agrees because no additional reports of low pulling hoists have been received since issuance of the SNPRM. The FAA has revised this final rule accordingly.

Request To Prohibit Maneuvering

In the SNPRM, the FAA proposed to require a placard and RFM limitation that warned the pilot about excessive maneuvering with a load on an extended cable and limited the maximum sustained bank angle to 20 degrees. Bell Canada stated that limits on bank angle (and pendulum angle) are difficult to monitor by aircrew and will increase crew workload, and therefore prohibiting maneuvering with load on extended cable is necessary to manage the risk of clutch slippage. The FAA infers that Bell Canada is requesting the FAA prohibit maneuvering with load on an extended cable for Model 429 and 430 helicopters.

The FAA disagrees with changing the flight limitation from a bank angle limit to a maneuvering prohibition. The FAA determined that limiting the bank angle in conjunction with a reduced maximum load mitigates the unsafe condition. The attitude indicator, which is used by the pilot to monitor the bank angle while maneuvering an external load, is in the pilot's normal field of view and is regularly monitored; therefore, any additional workload is minimal. The FAA does agree that requiring the aircrew to monitor the lateral pendulum angle of the hoist cable with respect to the helicopter's vertical axis would not be an acceptable limitation because it would not be measurable or enforceable.

Requests Regarding the Maximum Hoist Load Limitations

In the SNPRM, the FAA proposed to require a placard and revision to the RFM to reduce the weight limitations for the hoist load based on the outside air temperature. Bell Canada stated that the FAA's proposed limitations include a de-rating factor of 50 lbs, which is not warranted for Bell Canada Model 429 and 430 helicopters. In support, Bell Canada stated that the de-rating factor was established to accommodate certain maneuvering, which has been prohibited for the Bell Canada products.

The FAA determined the de-rating factor is necessary because it directly correlates to the bank angle limitation required by this AD.

Collins Aerospace requested the FAA change the proposed maximum hoist load limitations to distinguishing between non-modified hoists (without the number ''4'' as the first digit of its serial number (S/N)) and modified hoists with a new clutch (with the number ''4'' as the first digit of its S/N). Collins Aerospace stated that after EASA AD 2015–0226R1 was issued, Goodrich performed a series of characterization tests that demonstrated the performance envelope of the modified hoist in various conditions. According to Collins Aerospace, the results of these tests as documented in Goodrich Report No. 49000–1087, Revision A, dated July 31, 2017, indicate that margins are maintained with a less restrictive temperature limitation than those imposed on non-modified hoists.

As the FAA explained in the SNPRM, the FAA disagrees with requiring different maximum hoist load limitations for non-modified hoists and modified hoists. After reviewing the data in the report referenced by the

commenter, the FAA determined it does not demonstrate with an acceptable level of confidence that less restrictive temperature limitations are appropriate for modified hoists.

Requests Regarding the Partial Peel Out Requirement

In the SNPRM, the FAA proposed to prohibit use of the hoist if a partial peel out occurs, through both a placard limitation and a requirement to deactivate or remove the hoist. Bell Canada requested the FAA remove the proposed placard requirement because it only requires that the pilot cease using the hoist before the next flight and does not provide crew instructions to be executed during the hoist operation.

The placard provides requirements for the crew following any partial peel out. The FAA determined that the most effective way to provide this information to the aircrew is through a placard.

In the SNPRM, the FAA proposed to define partial peel out as occurring when 20 inches or more of the hoist cable reels off of the cable drum in one clutch slip incident. Bell Canada requested the FAA change this definition to ''approximately'' 20 inches. Bell Canada stated that a finite 20 inches will be difficult to measure; ''approximately 20 inches'' would be consistent with the Goodrich service information.

A measurement of ''approximately 20 inches'' would be vague in that it may be interpreted in more than one way. The operator is capable of measuring 20 or more inches of the hoist cable by, for example, using slippage markings on the cable.

Conclusion

Affected helicopters include helicopters that have been approved by the aviation authorities of Canada, Italy, France, and Germany and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA reviewed the relevant data, considered the comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for the changes described previously, this AD is adopted as proposed in the SNPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Goodrich Alert Service Bulletin No. ASB 44301–10–18, Revision 6, dated October 10, 2016, which specifies maximum hoist load limitations with respect to ambient temperature and describes actions and conditions that could reduce the capacity of the clutch. This service information also specifies procedures for inspecting the cable and inspecting the clutch by performing a cable conditioning lift and a hoist slip load test.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Differences Between This AD and the EASA AD

EASA AD 2015–0226R5 requires repetitively replacing the hoist with a modified hoist, whereas this AD requires a one-time replacement of the hoist with a modified hoist that has the improved clutch assembly installed. EASA AD 2015–0226R5 requires adding a placard or operational limitation to the RFM warning that exceeding 15° of lateral pendulum angle/helicopter vertical axis can lead to clutch slippage, and this AD does not. EASA AD 2015–0226R5 requires adding an operating limitation to the RFM limiting the number of persons who can be hoisted, whereas this AD does not. This AD requires replacing the cable before the next hoist operation if a cable has previously been load-tested at more than 1,500 lbs or at an unknown weight during at least one cable pull, while EASA AD 2015–0226R5 requires this replacement during multiple cable pulls. This AD requires visually inspecting and measuring the diameter of the cable before and after performing a cable conditioning and a hoist slip load test, whereas EASA AD 2015–0226R5 does not. This AD requires performing the cable conditioning and hoist slip load test within 30 days after the effective date of this AD, unless already done within the last 6 calendar months, and thereafter at intervals not to exceed 6 months, 400 lifts, or 300 cycles. EASA AD 2015–0226R5 specifies performing the hoist slip load test according to the compliance time of the design approval holder instead. After the installation (not reinstallation) of a modified hoist, EASA AD 2015–0226R5 requires performing an initial hoist load check/test prior to hoisting operation, whereas this AD does not.

Interim Action

The FAA considers this AD an interim action. The inspection reports required by this AD will enable better insight into the condition of the hoists, and eventually be used to develop final action to address the unsafe condition. Once final action has been identified, the FAA might consider further rulemaking.

Costs of Compliance

The FAA estimates that this AD affects 2,911 hoists installed on helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Replacing a clutch takes about 8 work-hours and parts cost about $24,000 for an estimated cost of $24,680 per hoist. Alternatively, replacing a hoist takes about 8 work-hours and parts cost about $200,000 for an estimated cost of $200,680 per hoist.

Revising the existing RFM for your helicopter and installing placards takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $125,173 for the U.S. fleet.

Deactivating or removing a hoist that experiences a partial peel out takes about 2 work-hours for an estimated cost of $170.

Reviewing records takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $125,173 for the U.S. fleet.

Inspecting the cable and performing a cable conditioning lift and hoist slip load test takes about 2 work-hours for an estimated cost of $170 per helicopter and $494,870 for the U.S. fleet per inspection cycle. A load check tool costs about $11,171. Reporting the hoist slip load test information takes about 0.25 work-hour for a cost of $21 per helicopter and $61,131 for the U.S. fleet per reporting cycle.

Replacing the cable takes about 3 work-hours and parts cost about $3,150 for a total replacement cost of $3,405 per hoist.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of

information is estimated to take approximately 0.25 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

AD 2022–05–10 Goodrich Externally-Mounted Hoist Assemblies: Amendment 39–21962; Docket No. FAA–2020–1120; Project Identifier 2019–SW–056–AD.

(a) Effective Date

This airworthiness directive (AD) is effective April 20, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to helicopters, certificated in any category, with an externally-mounted Goodrich hoist assembly (hoist) with a part number (P/N) or base P/N listed under the Hoist Family column in Table 1 of Goodrich Alert Service Bulletin No. 44301–10–18, Revision 6, dated October 10, 2016 (ASB 44301–10–18 Rev 6), installed. An affected hoist may be installed on but not limited to the following:

Note 1 to the introductory text of paragraph (c): The hoist P/N may be included as a component of a different part-numbered kit.

(1) Airbus Helicopters (previously Eurocopter France) Model AS332L, AS332L1, AS332L2, AS350B2, AS350B3, AS365N3, and EC225LP helicopters;

(2) Airbus Helicopters Deutschland GmbH (AHD) (previously Eurocopter Deutschland GmbH) Model EC135P1, EC135P2, EC135P2+, EC135P3, EC135T1, EC135T2, EC135T2+, EC135T3, MBB–BK 117 C–2, and MBB–BK 117 D–2 helicopters;

(3) Bell Textron Canada Limited (previously Bell Helicopter Textron Canada Limited) Model 429 and 430 helicopters;

(4) Bell Textron Inc. (previously Bell Helicopter Textron Inc.) Model 205A, 205A–1, 205B, 212, 412, 412CF, and 412EP helicopters;

(5) Leonardo S.p.a. (previously Finmeccanica S.p.A., AgustaWestland S.p.A) Model A109, A109A, A109A II, A109C, A109E, A109K2, A109S, AB139, AB412, AB412 EP, AW109SP, and AW139 helicopters;

(6) MD Helicopters, Inc. (MDHI) Model MD900 helicopters;

(7) Transport and restricted category helicopters, originally manufactured by Sikorsky Aircraft Corporation, Models S–61A, S–61L, S–61N, S–76A, S–76B, S–76C, S–76D, and S–92A; and

(8) Restricted category Model HH–1K, TH–1F, TH–1L, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and UH–1P helicopters.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 2500, Cabin Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by hoists failing lower load limit inspections. The FAA is issuing this AD to prevent failure of the hoist overload clutch. The unsafe condition, if not addressed, could result in an in-flight failure of the hoist, which could result in injury to a person being lifted.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Required Actions

(1) For a hoist without the number ''4'' as the first digit of its serial number (S/N):

(i) For hoists that use operating hours to monitor hoist operation, within 24 months after the effective date of this AD or before the hoist accumulates 55 total hoist operating hours, whichever occurs first, replace the hoist. For purposes of this AD, hoist operating hours are counted anytime the hoist motor is operating.

(ii) For hoists that use hoist cycles (cycles) to monitor hoist operation, within 24 months after the effective date of this AD or before the hoist accumulates 1,200 total cycles, whichever occurs first, replace the hoist. For purposes of this AD, a cycle is counted anytime the cable is extended and then retracted a minimum of 16 feet (5 meters) during flight or on the ground, with or without a load.

(iii) For hoists that use hoist lifts (lifts) to monitor hoist operation, within 24 months after the effective date of this AD or before the hoist accumulates 1,600 total lifts, whichever occurs first, replace the hoist. For purposes of this AD, a lift is counted anytime the cable is unreeled or recovered or both with a load attached to the hook, regardless of the length of the cable that is deployed or recovered. An unreeling or recovery of the cable with no load on the hook is not a lift. If a load is applied for half an operation (*i.e.* unreeling or recovery), it must be counted as one lift.

(2) For all hoists identified in the introductory text of paragraph (c) of this AD, before further flight, install placards and revise the existing Rotorcraft Flight Manual (RFM) for your helicopter by inserting a copy of this AD or by making pen-and-ink changes in Section 2, Limitations, of the RFM Supplement for the hoist as follows:

(i) For 500 pound (lb) rated hoists, install a placard with the information in Figure 1 to paragraph (g)(2)(i) of this AD in full view of the hoist operator and add the information in Figure 1 to paragraph (g)(2)(i) of this AD to the existing RFM for your helicopter.

BILLING CODE 4910–13–P

500 lb (227 kg) Rated Hoist
OAT above -4°F (-20°C): Maximum hoist load 450 lbs (204 kg) OAT at or below -4°F (-20°C): Maximum hoist load 400 lbs (181 kg)

Figure 1 to Paragraph (g)(2)(i)

(ii) For 600 lb rated hoists, install a placard with the information in Figure 2 to paragraph (g)(2)(ii) of this AD in full view of the hoist operator and add the information in Figure 2 to paragraph (g)(2)(ii) of this AD to the existing RFM for your helicopter.

600 lb (272 kg) Rated Hoist
OAT above 32°F (0°C): Maximum hoist load 550 lbs (249 kg) OAT at or below 32°F (0°C): Maximum hoist load 500 lbs (227 kg)

Figure 2 to Paragraph (g)(2)(ii)

(iii) For 500 and 600 lb rated hoists, install a placard with the information in Figure 3 to paragraph (g)(2)(iii) of this AD in full view of the pilot and add the information in Figure 3 to paragraph (g)(2)(iii) of this AD to the existing RFM for your helicopter.

Hoist Operations
Warning: Excessive maneuvering with extended cable and load on the hook may cause uncommanded peel out of the cable. Maximum sustained bank angle in turn is 20°

Figure 3 to Paragraph (g)(2)(iii)

(iv) For 500 and 600 lb rated hoists, install a placard with the information in Figure 4 to paragraph (g)(2)(iv) of this AD in full view of the pilot and add the

information in Figure 4 to paragraph (g)(2)(iv) of this AD to the existing RFM for your helicopter.

Hoist - Partial Peel Out
If a partial peel out occurs, before next flight, cease using the hoist. A partial peel out occurs when 20 inches (0.5 meter) or more of the hoist cable reels off of the hoist cable drum in one overload clutch slip incident.

Figure 4 to Paragraph (g)(2)(iv)

BILLING CODE 4910–13–C

(3) For all hoists identified in the introductory text of paragraph (c) of this AD, as of the effective date of this AD, if a partial peel out occurs, deactivate or remove the hoist from service before further flight. For purposes of this AD, a partial peel out occurs when 20 inches (0.5 meter) or more of the hoist cable reels off of the hoist cable drum in one overload clutch slip incident.

(4) For all hoists identified in the introductory text of paragraph (c) of this AD, within 30 days after the effective date of this AD, review the helicopter's hoist slip load test records. If the cable was load-tested at more than 1,500 lbs or at an unknown weight during one or more cable pulls, replace the cable with an airworthy cable before the next hoist operation.

(5) For all hoists identified in the introductory text of paragraph (c) of this AD, within 30 days after the effective date of this AD, unless already done within the last 6 calendar months, and thereafter at intervals not to exceed 6 months, 400 lifts, or 300 cycles, whichever occurs first:

(i) Visually inspect the first 18 inches (45 cm) of the cable from the hook assembly for broken wires and necked down sections. If there is a broken wire or necked down section, replace the cable with an airworthy cable before further flight.

(ii) Within the first 18 inches (45 cm) of the cable from the hook assembly, measure the diameter of the cable at the most necked down area. If the diameter measurement is less than 0.185 inch (4.7 mm), replace the cable with an airworthy cable before further flight.

(iii) Using load check tool P/N 49900–889–103 or 49900–889–104, perform a cable conditioning and a hoist slip load test by following the Accomplishment Instructions, paragraphs 3.C.(1) through 3.C.(3)(g) of ASB 44301–10–18 Rev 6. If the average of the five test values is less than the limit shown in Table 2 for 600 lb rated hoists or Table 3 for 500 lb rated hoists of ASB 44301–10–18 Rev 6, remove the hoist from service before further flight.

(iv) Visually inspect the first 30 feet (10 meters) of the cable from the hook assembly for broken wires, necked down sections, kinks, bird-caging, flattened areas, abrasion, and gouging. It is permissible for the cable to have a slight curve immediately after performing the hoist slip load test. If there is a broken wire, necked down section, kink, or any bird-caging; or if there is a flattened area, any abrasion, or a gouge that exceeds allowable limits, replace the cable with an airworthy cable before further flight.

(v) Repeat the actions specified in paragraphs (g)(5)(i) and (ii) of this AD. If there is a broken wire or necked down section or the cable diameter measurement is less than 0.185 inch (4.7 mm), replace the cable with an airworthy cable before further flight.

(6) Within 30 days after accomplishing the hoist slip load test, report the information requested in Appendix 1 to this AD by email to *ASB.SIS-CA@utas.utc.com;* or mail to Goodrich, Collins Aerospace; 2727 E. Imperial Hwy., Brea, CA 92821.

(7) As of the effective date of this AD, do not install as a replacement part or as an original installation an externally-mounted hoist with a P/N identified in the introductory text of paragraph (c) of this AD unless it has an improved overload clutch assembly with the number ''4'' as the first digit of the S/N.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Related Information

(1) For more information about this AD, contact Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *kristin.bradley@faa.gov.*

(2) The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD 2015–0226R5, Revision 5, dated July 23, 2020. You may view the EASA AD at *https://www.regulations.gov* in Docket No. FAA–2020–1120.

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Goodrich Alert Service Bulletin No. 44301–10–18, Revision 6, dated October 10, 2016.

(ii) [Reserved]

(3) For service information identified in this AD, contact Collins Aerospace; 2727 E Imperial Hwy., Brea, CA 92821; telephone (714) 984–1461; email *GHW@collins.com;* or at *https://www.collinsaerospace.com/.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Appendix 1 to AD 2022–05–10

Hoist Slip Load Test Results (sample format)

Provide the following information by email to *ASB.SIS-CA@utas.utc.com;* or mail to Goodrich, Collins Aerospace; 2727 E Imperial Hwy., Brea, CA 92821.

Helicopter Owner/Operator Name:
Email Address:
Telephone Number:
Helicopter Model and Serial Number:

Hoist Part Number:
Hoist Serial Number:
Time since Last Hoist Overhaul (months):
Hoist Operating Hours:
Hoist Cycles:
Hoist Lifts:
Date and Location Test was Accomplished:
Point of Contact for Additional Information:
Air Temperature:
Gearbox Lubricant:
Hoist Slip Load Test Value 1:
Hoist Slip Load Test Value 2:
Hoist Slip Load Test Value 3:
Hoist Slip Load Test Value 4:
Hoist Slip Load Test Value 5:
Hoist Slip Load Test Averaged Test Value:
Any notes or comments:

Issued on February 23, 2022.

Derek Morgan,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2022–05487 Filed 3–15–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1180; Project Identifier MCAI–2021–00794–R; Amendment 39–21967; AD 2022–06–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–3 helicopters. This AD was prompted by reports of a main rotor (M/R) blade lead-lag damper in a tilted position. This AD requires inspecting the Flex Control Unit (FCU), and corrective actions if necessary, as well as rework and re-identification of the bearing pin, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 20, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 20, 2022.

ADDRESSES: For EASA material incorporated by reference (IBR) in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1180.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1180; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the EASA AD, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0160, dated July 5, 2021 (EASA AD 2021–0160), to correct an unsafe condition for Airbus Helicopters Deutschland GmbH (AHD), formerly Eurocopter Deutschland GmbH, Model MBB–BK117 D–3 helicopters, all serial numbers, including Model MBB–BK117 D–2 helicopters that have been converted into Model MBB–BK117 D–3 helicopters through Airbus Helicopters Service Bulletin MBB–BK117 D–2–00–003.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–3 helicopters. The NPRM published in the **Federal Register** on January 14, 2022 (87 FR 2368). The NPRM was prompted by reports of an M/R blade lead-lag damper in a tilted position. EASA advises that subsequent investigation results determined that the tolerances stack-up may lead to an insufficient clamping on the bearing pin. The NPRM proposed to require inspecting the FCU, and corrective actions if necessary, as well as rework and re-identification of the bearing pin.

The FAA is issuing this AD to address this unsafe condition, which if not detected and corrected, could result in an unbalance of the M/R system, excessive vibration, and reduced control of the helicopter. See EASA AD 2021–0160 for additional background information.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0160 requires a one-time inspection of the affected FCU and depending on findings, accomplishment of applicable corrective actions. EASA AD 2021–0160 also requires after the initial FCU inspection, re-working and re-identifying each affected part by marking the part with a letter ''M.'' EASA AD 2021–0160 also prohibits installing an affected FCU or affected part on any helicopter.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

The FAA reviewed Airbus Helicopters Alert Service Bulletin ASB MBB–BK117 D–3–62A–002, dated June 29, 2021, which specifies procedures for a one-time inspection of the FCU and re-work of the bearing pin installed on the support assembly.

Costs of Compliance

The FAA estimates that this AD affects 41 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Inspecting each FCU, including inspecting each rotor hub-shaft, hexagonal screw, nut, damper assembly, bearing pin, support assembly, spherical bearing, and integrated bearing sleeve, takes about 3 work-hours for an estimated cost of $255 per FCU inspection and $10,455 for the U.S. fleet per FCU inspection.

Reworking and re-identifying the bearing pin takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $1,763 for the U.S. fleet per bearing pin.

The FAA has received no definitive data on which to base the cost estimates for the on-condition repairs specified in this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2022–06–01 Airbus Helicopters Deutschland GmbH: Amendment 39–21967; Docket No. FAA–2021–1180; Project Identifier MCAI–2021–00794–R.

(a) Effective Date

This airworthiness directive (AD) is effective April 20, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–3 helicopters, certificated in any category.

Note 1 to paragraph (c) of this AD: Model MBB–BK117 D–2 helicopters that have been converted into Model MBB–BK117 D–3 helicopters are Model MBB–BK 117 D–3 helicopters and this AD is also applicable to those helicopters.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6200, Main Rotor System.

(e) Unsafe Condition

This AD was prompted by reports of a main rotor (M/R) blade lead-lag damper in a tilted position. The FAA is issuing this AD to prevent an unbalance of the M/R system. The unsafe condition, if not addressed, could result in excessive vibration and reduced control of the helicopter.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0160, dated July 5, 2021 (EASA AD 2021–0160).

(h) Exceptions to EASA AD 2021–0160

(1) Where EASA AD 2021–0160 requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(2) Where EASA AD 2021–0160 refers to its effective date, this AD requires using the effective date of this AD.

(3) Where the service information referenced in EASA AD 2021–0160 specifies to contact Airbus Helicopters or replace the Flex Control Unit (FCU) if you find cracks or damage at the protruding conical end of the integrated bearing sleeve, this AD requires removing the FCU from service and replacing with an airworthy part, or repairing the FCU in accordance with a method approved by the Manager, General Aviation & Rotorcraft Section, International Validation Branch, FAA; or EASA; or Airbus Helicopters' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(4) Where a work card in the service information referenced in EASA AD 2021–0160 specifies performing the corrective action and contacting Airbus Helicopters when discrepancies are found, this AD requires performing the corrective actions as specified in the work card but does not require contacting Airbus Helicopters.

(5) Where a work card in the service information referenced in EASA AD 2021–0160 specifies to do a dye penetrant inspection for the inspection of Zone B of the rotor hub-shaft ''if you are not sure there are cracks,'' this AD requires performing a dye penetrant inspection.

(6) Where paragraph (5) of EASA AD 2021–0160 specifies ''it is allowed to install a hexagonal screw P/N D622M0500207 on any helicopter, provided that installation is accomplished in accordance with the instructions of section 3.D of the ASB, or in accordance with the instructions of an AMM revision which includes the technical content of section 3.D of the ASB,'' for this AD replace the text ''in accordance with the instructions of section 3.D of the ASB, or in accordance with the instructions of an AMM revision which includes the technical content of section 3.D of the ASB'' with ''in accordance with the instructions of section 3.D of the ASB, or in accordance with the instructions of an AMM revision which includes the identical content of section 3.D of the ASB.''

(7) This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2021–0160.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2021–0160 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the helicopter can be modified, provided no passengers are onboard.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(l) Related Information

For more information about this AD, contact Andrea Jimenez, Aerospace Engineer, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (516) 228–7330; email *andrea.jimenez@faa.gov.*

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2021–0160, dated July 5, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0160, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find the EASA material on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1180.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on March 9, 2022.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2022–05497 Filed 3–15–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0279; Project Identifier AD–2022–00257–T; Amendment 39–21982; AD 2022–06–16]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, and 747–400F series airplanes. This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a recent determination that during takeoff, approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged, which could result in reduced ability of the flightcrew to maintain safe flight and landing of the airplane. This AD requires revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate specific operating procedures for takeoff, instrument landing system (ILS) approaches, non-precision approaches, and go-around and missed approaches, when in the presence of 5G C-Band interference as identified by Notices to Air Missions (NOTAMs). The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 16, 2022.

The FAA must receive comments on this AD by May 2, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2022–0279; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Dean Thompson, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3165; email: *Dean.R.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

In March 2020, the United States Federal Communications Commission (FCC) adopted final rules authorizing flexible use of the 3.7–3.98 GHz band for next generation services, including 5G and other advanced spectrum-based services.[1] Pursuant to these rules, C-Band wireless broadband deployment was permitted to occur in phases with the opportunity for operations in the lower 0.1 GHz of the band (3.7–3.8 GHz) in certain markets beginning on January 19, 2022. This AD refers to ''5G C-Band'' interference, but wireless broadband technologies, other than 5G, may use the same frequency band.[2] These other uses of the same frequency band are within the scope of this AD since they would introduce the same risk of radio altimeter interference as 5G C-Band.

The radio altimeter is an important aircraft instrument, and its intended function is to provide direct height-above-terrain/water information to a variety of aircraft systems. Commercial aviation radio altimeters operate in the 4.2–4.4 GHz band, which is separated by 0.22 GHz from the C-Band telecommunication systems in the 3.7–3.98 GHz band. The radio altimeter is more precise than a barometric altimeter and for that reason is used where aircraft height over the ground needs to

[1] The FCC's rules did not make C-Band wireless broadband available in Alaska, Hawaii, and the U.S. Territories.

[2] The regulatory text of the AD uses the term ''5G C-Band'' which, for purposes of this AD, has the same meaning as ''5G'', ''C-Band'' and ''3.7–3.98 GHz.''

be precisely measured, such as autoland, manual landings, or other low altitude operations. The receiver on the radio altimeter is typically highly accurate, however it may deliver erroneous results in the presence of out-of-band radio frequency emissions from other frequency bands. The radio altimeter must detect faint signals reflected off the ground to measure altitude, in a manner similar to radar. Out-of-band signals could significantly degrade radio altimeter functions during critical phases of flight, if the altimeter is unable to sufficiently reject those signals.

The FAA issued AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) (AD 2021–23–12) to address the effect of 5G C-Band interference on all transport and commuter category airplanes equipped with a radio (also known as radar) altimeter. AD 2021–23–12 requires revising the limitations section of the existing AFM to incorporate limitations prohibiting certain operations, which require radio altimeter data to land in low visibility conditions, when in the presence of 5G C-Band interference as identified by NOTAM. The FAA issued AD 2021–23–12 because radio altimeter anomalies that are undetected by the automation or pilot, particularly close to the ground (*e.g.,* landing flare), could lead to loss of continued safe flight and landing.

Since the FAA issued AD 2021–23–12, Boeing has continued to evaluate potential 5G C-Band interference on aircraft systems that rely on radio altimeter inputs. Boeing issued Boeing Multi Operator Message MOM–MOM–22–0034–01B(R2), dated January 28, 2022; Boeing Multi Operator Message MOM–MOM–22–0033–01B(R1), dated January 31, 2022; and Boeing Flight Crew Operations Manual Bulletin TB1–55, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated January 29, 2022.

Based on Boeing's data, the FAA identified an additional hazard presented by 5G C-Band interference on The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, and 747–400F series airplanes. The FAA determined anomalies due to 5G C-Band interference may affect multiple other airplane systems using radio altimeter data, regardless of the approach type or weather. These anomalies may not be evident until very low altitudes. Impacted systems include, but are not limited to, autopilot flight director system; autothrottle system; engines; flight controls; flight instruments; traffic alert and collision avoidance system (TCAS); ground proximity warning system (GPWS); and configuration warnings.

In the event of 5G C-Band interference, landing performance and flightcrew workload can be adversely impacted. 5G C-Band interference may have multiple effects, including:

- *Autopilot Flight Director System:* NO AUTOLAND caution or advisory message may be shown; NO AUTOLAND autopilot status annunciation may be shown; autopilot may disengage when LAND 2 or LAND 3 status is shown; the flight directors may provide erroneous guidance during ILS approaches; LNAV and VNAV modes may not engage or may engage at an erroneous altitude after departure; autoland flare mode and runway alignment may not occur or may activate earlier or later than expected; or TO/GA mode may not be available.
- *Autothrottle System:* Autothrottle can remain in SPD (speed) mode and may advance to maintain speed during flare instead of reducing the thrust to IDLE at approximately 25 feet radio altitude; or autothrottle may retard to IDLE prematurely.
- *Engines:* Thrust levers being set to IDLE in-flight may result in ground idle.
- *Flight Controls:* SPEEDBRAKE EXT Caution message may not be available. Automatic speedbrake deployment may not occur after touchdown.
- *Flight Instruments:* The radio altimeter indication may not be shown or may be erroneous; the RADIO minimums indications (flashing or turning amber) may not occur; the rising runway symbol may not be shown or may be erroneous; the localizer deviation alert amber scale and flashing pointer may not be shown (deviation indications are still available); the glideslope deviation alert amber scale and flashing pointer may not be shown (deviation indications are still available); or the Flight Path Vector (FPV) may be biased out of view.
- *TCAS:* TCAS alerts may not be available (TCAS alerts that do occur will be valid); or TCAS inhibits for resolution advisories may be erroneous.
- *GPWS:* GPWS alerts may not be available or may be erroneous (although look-ahead terrain alerting remains available); radio altimeter-based altitude and minimums aural callouts during approach may not be available or erroneous; or windshear detection systems (predictive and reactive) may be inoperative.
- *Configuration Warnings:* Erroneous CONFIG GEAR warning alert may occur.
- Other simultaneous flight deck effects associated with the 5G C-Band interference could increase pilot workload.

These effects may cause erroneous indications and annunciations, as well as conflicting information, to be provided to the flightcrew during a critical phase of flight. There may also be a lack of cues present to elicit prompt go-around or recovery initiation. These effects could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane and is an unsafe condition. Thus, the FAA has determined that prompt identification of a potential problem and initiation of a go-around are required to ensure the capability for continued safe flight and landing.

To address this unsafe condition, this AD mandates procedures for operators to incorporate specific operating procedures for takeoff, ILS approaches, non-precision approaches, and go-around and missed approaches, when in the presence of 5G C-Band interference as identified by NOTAMs.

Finally, the FAA notes that AD 2021–23–12 remains in effect and thus prohibits certain ILS approaches. Thus, this AD addresses procedures applicable only to those ILS approaches not prohibited by AD 2021–23–12.

The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires revising the limitations and operating procedures sections of the existing AFM to incorporate specific operating procedures for takeoff, instrument landing system (ILS) approaches, non-precision approaches, and go-around and missed approaches, when in the presence of 5G C-Band interference as identified by NOTAMs.

Compliance With AFM Revisions

Section 91.9 prohibits any person from operating a civil aircraft without complying with the operating limitations specified in the AFM. FAA regulations also require operators to furnish pilots with any changes to the AFM (14 CFR 121.137) and pilots in command to be familiar with the AFM (14 CFR 91.505).

Interim Action

The FAA considers this AD to be an interim action. If final action is later identified, the FAA might consider further rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because the FAA determined that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band, and a determination that during takeoff, approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. This increased flightcrew workload could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane. The urgency is based on the hazard presented by 5G C-Band interference, and on C-Band wireless broadband deployment, which has been occurring in phases with operations beginning on January 19, 2022. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include Docket No. FAA–2022–0279 and Project Identifier AD–2022–00257–T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Dean Thompson, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3165; email: *Dean.R.Thompson@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 126 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision	1 work-hour × $85 per hour = $85	$0	$85	$10,710

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2022–06–16 The Boeing Company: Amendment 39–21982; Docket No. FAA–2022–0279; Project Identifier AD–2022–00257–T.

(a) Effective Date

This airworthiness directive (AD) is effective March 16, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, and 747–400F series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a recent determination that during takeoff, approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. The FAA is issuing this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Airplane Flight Manual (AFM) Revision

(1) Within 2 days after the effective date of this AD: Revise the Limitations section of the existing AFM to include the information specified in figure 1 to paragraph (g)(1) of this AD. This may be done by inserting a copy of figure 1 to paragraph (g)(1) of this AD into the Limitations section of the existing AFM.

BILLING CODE 4910–13–P

Figure 1 to paragraph (g)(1) – *AFM Limitations Revision*

(Required by AD 2022-06-16)

Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around

The following limitations are required for dispatch or release to airports, and takeoff, approach, landing, and go-around on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Takeoff, Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around procedure contained in the Operating Procedures section of this AFM.

(2) Within 2 days after the effective date of this AD: Revise the Operating Procedures section of the existing AFM to include the information specified in figure 2 to paragraph (g)(2) of this AD. This may be done by inserting a copy of figure 2 to paragraph (g)(2) of this AD into the Operating Procedures section of the existing AFM.

Figure 2 to paragraph (g)(2) – *AFM Operating Procedures Revision*

(Required by AD 2022-06-16)

Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around

Takeoff

If autopilot does not engage above the minimum altitude, when at a safe altitude, select both flight director switches OFF, then ON, to re-engage. LNAV and VNAV may not engage or engage at an erroneous altitude after departure.

ILS Approaches

For ILS approaches, disconnect the autopilot and autothrottle, and place both flight director switches to OFF prior to glideslope intercept. Do not set RADIO minimums on the EFIS control panel, use BARO minimums only.

Non-Precision Approaches

Autopilot, autothrottles, and flight directors may be used. Do not use autothrottles if the autopilot is disengaged. Prior to descending below MDA, disconnect the autothrottle and disengage the autopilot.

Landing

Do not rely on radio altimeter-based altitude aural callouts during approach. Adjust operational (time of arrival) landing distance for manual speedbrake deployment.

During Go-Around and Missed Approach

If go-around is required, ensure thrust is increased to go-around power.

When the flight director switches are OFF, push either TO/GA switch to display the flight director bars. When able, turn both flight directors to ON.

TO/GA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

Note 1 to paragraph (g)(2): Guidance for accomplishing the actions required by paragraph (g)(2) of this AD can be found in Boeing Multi Operator Message MOM–MOM–22–0034–01B(R2), dated January 28, 2022; Boeing Multi Operator Message MOM–MOM–22–0033–01B(R1), dated January 31, 2022; and Boeing Flight Crew Operations Manual Bulletin TB1–55, ''Radio Altimeter Anomalies due to 5G C-Band Wireless Broadband Interference in the United States,'' dated January 29, 2022.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021), providing relief for specific radio altimeter installations are approved as AMOCs for the provisions of this AD.

(i) Related Information

(1) For more information about this AD, contact Dean Thompson, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3165; email: *Dean.R.Thompson@faa.gov.*

(2) For service information identified in this AD that is not incorporated by reference, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110 SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.*

(j) Material Incorporated by Reference

None.

Issued on March 9, 2022.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2022–05576 Filed 3–11–22; 4:15 pm]

BILLING CODE 4910–13–C

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 738 and 746

[Docket No. 220311–0071]

RIN 0694–AI78

Imposition of Sanctions on 'Luxury Goods' Destined for Russia and Belarus and for Russian and Belarusian Oligarchs and Malign Actors Under the Export Administration Regulations (EAR)

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In response to the Russian Federation's (Russia's) further invasion of Ukraine, and Belarus's substantial enabling of Russia's invasion, the Department of Commerce is imposing restrictions on the export, reexport, or transfer (in-country) to or within Russia or Belarus of 'luxury goods' under the Export Administration Regulations (EAR) and for exports, reexports and transfers (in-country) worldwide to certain Russian or Belarusian oligarchs and other malign actors supporting the Russian or Belarusian governments. Taken together, these new export controls will significantly limit financially elite individuals' and organizations' access to luxury goods and thereby accentuate the consequences of providing such support.

DATES: This rule is effective on March 11, 2022.

FOR FURTHER INFORMATION CONTACT: For questions on this final rule, contact Eileen Albanese, Director, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–0092, Fax: (202) 482–482–3355, Email: *rpd2@bis.doc.gov.* For emails, include ''Luxury Goods Sanctions Russia and Belarus'' in the subject line.

SUPPLEMENTARY INFORMATION:

I. Background

In response to Russia's February 2022 further invasion of Ukraine and Belarus' substantial enabling of this invasion, the Bureau of Industry and Security (BIS) imposed extensive sanctions on Russia and Belarus under the Export Administration Regulations (15 CFR parts 730–774) (EAR) by implementing the final rule, *Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR),* effective February 24, 2022 (''Russia Sanctions rule'') [1] and three subsequent final rules published in March 2022, *Imposition of Sanctions Against Belarus Under the Export Administration Regulations (EAR),* effective March 2, 2022 (''Belarus Sanctions rule''); [2] *Expansion of Sanctions Against the Russian Industry Sector Under the Export Administration Regulations (EAR),* effective March 3, 2022 (''Industry Sector Sanctions rule''); [3] and *Further Imposition of Sanctions Against Russia with the Addition of Certain Entities to the Entity List,* effective March 3, 2022 (''Russia Entity List rule'').[4] BIS also published an additional rule in March 2022, *Addition to the List of Countries Excluded from Certain License Requirements under the Export Administration Regulations (EAR),* effective March 4, 2022 (''South Korea exclusion rule'') [5] that added South Korea to the list of countries in supplement no. 3 to part 746 that are excluded from certain § 746.8 license requirements that pertain to items destined for Russia or Belarus. As described in the Russia Sanctions rule's preamble, as well as in the other rules published in March 2022, Russia's invasion of Ukraine, and Belarus's substantial enabling of Russia's invasion of Ukraine, flagrantly violates international law, is contrary to U.S. national security and foreign policy interests, and undermines global order, peace, and security, necessitating the imposition of stringent sanctions.

By restricting Russia's and Belarus's access to 'luxury goods' in order to increase the costs on Russian and Belarusian persons who support the government of Russia and its invasion of Ukraine, the export control measures implemented in this final rule build upon the policy objectives set forth in the Russian Sanctions rule and in the Belarus Sanctions rule. These individuals include Russian and Belarusian persons (together, Russian and Belarusian oligarchs and malign actors), wherever located, who have been designated by the Department of the Treasury, Office of Foreign Assets Control's (OFAC) under or pursuant to certain Russia and Ukraine-related Executive Orders issued in response to Russia's 2014 occupation of Crimea and related destabilizing conduct in Ukraine and are listed on the List of Specially Designated Nationals and Blocked Persons (SDN List) maintained by OFAC. *See http://www.treasury.gov/sdn.*

The changes made by this rule are intended to limit access to 'luxury goods' by restricting the export, reexport and transfer (in-country) of certain items subject to the EAR that are desired by wealthy Russian and Belarusian citizens, including Russian and Belarusian oligarchs and malign actors. Limiting the export, reexport, and transfer (in-country) of 'luxury goods' will undermine the ability of these Russian and Belarusian individuals to acquire luxury items, thereby further highlighting to these influential individuals the financial consequences to their lifestyle of Russia's invasion of Ukraine. With respect to these Russian and Belarusian oligarchs and malign actors, these restrictions on access to 'luxury goods' complement asset blocking measures imposed by OFAC and by partner and allied countries. By restricting Russian and Belarusian oligarchs' and malign actors' access to 'luxury goods,' the United States is also highlighting to such actors, the loss of the benefits of full participation in the international market.

The export controls in this rule target 'luxury goods' for export or reexport to or transfer within Russia or Belarus, as well as to certain Russian and Belarusian oligarchs and malign actors, wherever they are located. This rule is part of larger U.S. Government and partner and allied country actions intended to steadily increase the financial consequences on Russia and Belarus as a result of Russia's invasion of Ukraine and Belarus's substantial enabling of Russia's invasion, as well as on Russian and Belarusian individuals who have supported Russia's destabilizing conduct since Russia's 2014 occupation of the Crimea region of Ukraine.

II. Overview of New Controls

Through this rule, BIS is implementing two new license requirements: One that applies to 'luxury goods' subject to the EAR that are destined for Russia or Belarus and another that applies to such items that are destined for Russian and Belarusian oligarchs and malign actors, regardless of their geographical location, who have been designated by OFAC under certain Russia- or Ukraine-related Executive orders. For purposes of these new license requirements, a 'luxury good' refers to any item that is identified in new supplement no. 5 to part 746 of the EAR. The license requirement specific to Russia and Belarus for 'luxury goods' is added under new § 746.10(a)(1) of the EAR ('Luxury goods' license

[1] 87 FR 12226 (March 3, 2022).
[2] 87 FR 13048 (March 8, 2022).
[3] 87 FR 12856 (March 8, 2022).
[4] 87 FR 13141 (March 9, 2022).
[5] 87 FR 13627 (March 10, 2022).

requirements for Russia and Belarus) (Embargoes and Other Special Controls). The license requirement specific to the designated Russian and Belarusian oligarchs and malign actors for 'luxury goods' is added under new § 746.10(a)(2) of the EAR (Worldwide license requirement for 'luxury goods' for designated Russian and Belarusian oligarch and malign actors).

The new license requirements set forth in paragraphs (a)(1) and (2) apply to the 'luxury goods' identified in supplement no. 5 to part 746. The difference between the two new license requirements is that while the license requirements under paragraph (a)(1) apply to exports and reexports to Russia and Belarus or transfers within Russia and Belarus, regardless of the end user, the license requirement under paragraph (a)(2) is a worldwide license requirement that applies to Russian and Belarusian oligarchs and malign actors designated by OFAC pursuant to certain specified Executive Orders, as described further below.

A very limited number of license exceptions described in § 746.10(c)(1) and (2) may be used to overcome the license requirements in § 746.10(a)(1) if all of the applicable requirements of the license exceptions can be met. No license exceptions are available to overcome the license requirements in § 746.10(a)(2). When a license is required, applications for such items will be subject to a policy of denial.

III. Amendments to the Export Administration Regulations (EAR)

A. Sanctions on 'Luxury Goods' Destined for Russia or Belarus and for Russian or Belarusian Oligarchs and Malign Actors

Addition of Expansive License Requirements, Restrictive License Review Policies, and Restrictions on License Exception Eligibility for 'Luxury Goods' Destined for Russia or Belarus and for Russian or Belarusian Oligarchs and Malign Actors Worldwide

This final rule adds a new § 746.10 ('Luxury goods' sanctions against Russia and Belarus and Russian and Belarusian Oligarchs and Malign Actors). This new section consists of two new license requirements added under paragraphs (a)(1) and (2). This rule also adds paragraph (b) to § 746.10 to specify the license review policy for the new license requirements under paragraphs (a)(1) and (2). Additionally, this rule adds paragraph (c) to § 746.10 to exclude the use of EAR license exceptions to overcome the license requirements under new paragraphs (a)(1) and (2), except for the limited number of license exceptions identified under paragraphs (c)(1) and (2). Finally, this rule adds supplement no. 5 to part 746 that identifies the 'luxury goods' that are subject to the license requirements under paragraphs (a)(1) and (2) to § 746.10. These changes are described in greater detail below.

1. Section 746.10(a)(1) 'Luxury Goods' License Requirements for Russia and Belarus

This rule adds new paragraph (a)(1) that imposes license requirements for exports and reexports to or transfers within Russia and Belarus of the 'luxury goods' identified in new supplement no. 5 to part 746. This license requirement is in addition to license requirements specified on the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR and in other provisions of the EAR, including part 744 and §§ 746.5 and 746.8. New supplement no. 5 to part 746, which is also added to the EAR in this rule, is the listing of the 'luxury goods' that are subject to a license requirement under paragraphs (a)(1) and (2), as described below.

2. Section 746.10(a)(2) Worldwide License Requirement for 'Luxury Goods' for Russian or Belarusian Oligarch and Malign Actors

This rule adds paragraph (a)(2) to impose license requirements for exports and reexports to or transfers (in-country), of 'luxury goods' identified in new supplement no. 5 to part 746, to certain Russian and Belarusian oligarchs and malign actors (as described below), wherever located. This license requirement is in addition to license requirements specified on the CCL in supplement no. 1 to part 774 of the EAR and in other provisions of the EAR, including part 744 and §§ 746.5 and 746.8.

The Russian and Belarusian oligarchs and malign actors to whom this new license requirement under paragraph (a)(2) applies are individuals who have been designated by OFAC under or pursuant to seven Executive orders and identified on the SDN List. The applicable SDN List identifiers for persons designated pursuant to these seven Executive Orders are: [RUSSIA-EO14024], [UKRAINE-EO13660], [UKRAINE-EO13661], [UKRAINE-EO13662], [UKRAINE-EO13685], [BELARUS], and [BELARUS-EO14038]. The license requirement applies to exports, reexports, or transfers (in-country) worldwide of any 'luxury good' ''subject to the EAR'' identified in supplement no. 5 to this part that is destined for any designated Russian or Belarusian oligarch or malign actor, or in situations in which a party to the transaction is a Russian or Belarusian oligarch or malign actor who has been designated in or pursuant to one of the specified Executive orders. This rule specifies that for purposes of paragraph (a)(2), an 'oligarch or malign actor' is any natural person that is designated on the SDN List with any of the designations referenced in paragraph (a)(2).

This rule also adds a note to paragraph (a) to specify that for purposes of paragraphs (a)(1) and (2), a 'luxury good' means any item that is identified in supplement no. 5 to part 746. BIS estimates that these new controls in § 746.10(a)(1) and (2) will result in an additional 750 license applications being submitted to BIS annually.

3. Licensing Policy for Applications Required Under § 746.10

Under paragraph (b) (Licensing Policy) of § 746.10, applications for export or reexport to or transfer within Russia or Belarus that require a license under new paragraph (a)(1), and applications for exports, reexports, or transfers (in-country) worldwide that are destined for Russian or Belarusian oligarchs and malign actors that are subject to the new license requirement (or in situations in which the latter are parties to the transaction as described in § 748.5(c) through (f) of the EAR) that require a license under new paragraph (a)(2) will be reviewed under a policy of denial.

4. License Exceptions for § 746.10 License Requirements

Under paragraph (c) (License Exceptions), this rule specifies that a limited number of license exceptions may overcome the license requirements in § 746.10(a)(1) for transactions involving Russia or Belarus. Specifically, the only license exceptions that are available to overcome the license requirements in § 746.10(a)(1) are as follows: License Exception BAG, excluding firearms and ammunition (paragraph (e)), § 740.14; and License Exception AVS for saloon stores and supplies under § 740.15(b)(3)(v), excluding saloon stores and supplies for any aircraft registered in, owned, or controlled by, or under charter or lease by Russia, Belarus or a national of Russia or Belarus. The limited AVS eligibility is included to cover third country airlines flying to Russia or Belarus.

This rule also specifies that no license exceptions may overcome the license requirements in § 746.10(a)(2) that apply

to the designated Russian and Belarusian oligarchs and malign actors.

5. Addition of New Supplement To Identify 'Luxury Goods' for Purposes of § 746.10

This final rule adds a new supplement no. 5 to part 746: 'Luxury Goods' that Require a License for Export, Reexport, and Transfer (In-Country) to or within Russia or Belarus Pursuant to § 746.10(a)(1) and (2). This supplement is the listing of the 'luxury goods' that are subject to the license requirements under paragraphs (a)(1) and (2) of § 746.10. This supplement includes three columns consisting of the Schedule B, 2-Digit Chapter Headings, and 10-Digit Commodity Descriptions and Per Unit Wholesale Price in the U.S. if applicable. This new supplement will assist exporters, reexporters, and transferors in determining whether an item at issue falls within the scope of this supplement no. 5 to part 746 and consequently will require a license under § 746.10(a)(1) and (2) of the EAR.

C. Conforming Changes

Based on the foregoing changes to the EAR, this final rule also makes certain conforming revisions to the Commerce Country Chart in supplement no. 1 to part 738.

1. Commerce Country Chart Changes

In supplement no. 1 to part 738 (Commerce Country Chart), as a conforming change, this final rule revises footnote 6 to add a reference to § 746.10 of the EAR for additional license requirements for exports, reexports, or transfers (in-country) to or within Russia or Belarus involving 'luxury goods' ''subject to the EAR'' that are identified in supplement no. 5 to part 746 of the EAR, to facilitate exporters', reexporters', and transferors' awareness of the need to review the license requirements in § 746.10.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on March 11, 2022, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR).

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (codified, as amended, at 50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. The International Emergency Economic Powers Act (IEEPA) (codified, as amended, at 50 U.S.C. 1701 *et seq.*) and the Executive Order on Prohibiting Certain Imports, Exports, and New Investment with Respect to Continued Russian Federation Aggression, dated March 11, 2022 also serve as additional authorities for this rule. To the extent it applies to certain activities that are the subject of this rule, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (codified, as amended, at 22 U.S.C. 7201–7211) also serves as authority for this rule.

Rulemaking Requirements

1. This final rule is not a ''significant regulatory action'' because it ''pertain[s]'' to a ''military or foreign affairs function of the United States'' under sec. 3(d)(2) of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves three collections of information. BIS believes there will be minimal burden changes to two of these collections—Five-Year Records Retention Requirement for Export Transactions and Boycott Actions (OMB control number 0694–0096) and Automated Export System (AES) Program (OMB control number 0607–0152).

However, ''Multi-Purpose Application (OMB control number 0694–0088) will exceed existing estimates currently associated with this collection as the respondent burden will increase the estimated number of submissions by 750 for license applications submitted annually to BIS. BIS estimates the burden hours associated with this collection would increase by 382 (*i.e.,* 750 applications × 30.6 minutes per response) for a total estimated cost increase of $11,460 (*i.e.,* 382 hours × $30 per hour). The $30 per hour cost estimate for OMB control number 0694–0088 is consistent with the salary data for export compliance specialists currently available through glassdoor.com (glassdoor.com estimates that an export compliance specialist makes $55,280 annually, which computes to roughly $26.58 per hour). Consistent with 5 CFR 1320.13, BIS requested, and OMB has approved, emergency clearance for an increase in the burden estimate due to the additional license requirements imposed by this rule.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018 (50 U.S.C. 4821) (ECRA), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date. While section 1762 of ECRA provides sufficient authority for such an exemption, this action is also independently exempt from these APA requirements because it involves a military or foreign affairs function of the United States (5 U.S.C. 553(a)(1)).

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects

15 CFR Part 738

Exports.

15 CFR Part 746

Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, parts 738 and 746 of the Export Administration Regulations (15 CFR parts 730 through 774) are amended as follows:

PART 738—COMMERCE CONTROL LIST OVERVIEW AND THE COUNTRY CHART

■ 1. The authority citation for 15 CFR part 738 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824;

50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Supplement no. 1 to part 738 is amended by revising footnote 6 to read as follows:

Supplement No. 1 to Part 738—Commerce Country Chart

* * * * *

[6] See § 746.5 of the EAR for additional license requirements under the Russian industry sector sanctions for ECCNs 0A998, 1C992, 3A229, 3A231, 3A232, 6A991, 8A992, and 8D999 and items identified in supplements no. 2 and no. 4 to part 746 of the EAR. See § 746.8 of the EAR for Sanctions against Russia and Belarus, including additional license requirements for items listed in any ECCN in Categories 3, 4, 5, 6, 7, 8, or 9 of the CCL. See § 746.10 of the EAR for additional license requirements that apply to Russia and Belarus and to certain Russian and Belarusian oligarchs and malign actors regardless of their destination, for 'luxury goods' ''subject to the EAR,'' as identified in supplement no. 5 to part 746 of the EAR.

* * * * *

PART 746—EMBARGOES AND OTHER SPECIAL CONTROLS

■ 3. The authority citation for 15 CFR part 746 is continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 287c; Sec 1503, Pub. L. 108–11, 117 Stat. 559; 22 U.S.C. 2151 note; 22 U.S.C. 6004; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p 168; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Presidential Determination 2007–7, 72 FR 1899, 3 CFR, 2006 Comp., p. 325; Notice of May 6, 2021, 86 FR 26793 (May 10, 2021).

■ 4. Section 746.10 is added to read as follows:

§ 746.10 'Luxury goods' sanctions against Russia and Belarus and Russian and Belarusian oligarchs and malign actors.

(a) *License requirements*—(1) *'Luxury goods' license requirements for Russia and Belarus.* In addition to the license requirements specified on the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR and in other provisions of the EAR, including part 744 and §§ 746.5 and 746.8, a license is required to export, reexport, or transfer (in-country) to or within Russia or Belarus any 'luxury good' subject to the EAR, as identified in supplement no. 5 to this part.

(2) *Worldwide license requirement for 'luxury goods' for Russian and Belarusian oligarch and malign actors.* In addition to the license requirements specified on the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR and in other provisions of the EAR, including part 744 and §§ 746.5 and 746.8, a license is required to export, reexport, or transfer (in-country) worldwide any 'luxury good' subject to the EAR, as identified in supplement no. 5 to this part, to any Russian or Belarusian oligarch or malign actor, regardless of location, who are designated on the Department of the Treasury, Office of Foreign Assets Control's (OFAC) List of Specially Designated Nationals and Blocked Persons (SDN List) with any of the following designations: [RUSSIA-EO14024], [UKRAINE-EO13660], [UKRAINE-EO13661], [UKRAINE-EO13662], [UKRAINE-EO13685], [BELARUS], and [BELARUS-EO14038] or in situations in which any such Russian or Belarusian oligarch or malign actor is a party to the transaction as described in § 748.5(c) through (f). For purposes of this paragraph (a)(2), an 'oligarch or malign actor' is any natural person that is designated on the SDN List with any of the designations referenced in this paragraph (a)(2).

Note to paragraph (a): For purposes of paragraphs (a)(1) and (2) of this section, a 'luxury good' means any item that is identified in supplement no. 5 to this part.

(b) *Licensing policy.* Applications for the export, reexport, or transfer (in-country) of any item that requires a license for export or reexport to or transfer (in-country) pursuant to the requirements of this section will be reviewed with a policy of denial.

(c) *License exceptions.* No license exceptions may overcome the license requirements in paragraph (a)(1) of this section except the license exceptions identified in paragraphs (c)(1) and (2) of this section. No license exceptions may overcome the license requirements in paragraph (a)(2) of this section.

(1) License Exception BAG, excluding firearms and ammunition (§ 740.14, excluding paragraph (e), of the EAR).

(2) License Exception AVS for saloon stores and supplies, excluding any saloon stores and supplies for aircraft registered in, owned, or controlled by, or under charter or lease by Russia or Belarus or a national of Russia or Belarus (§ 740.15(b)(3)(v) of the EAR).

■ 5. Add supplement no. 5 to part 746 to read as follows:

Supplement No. 5 to Part 746—'Luxury Goods' That Require a License for Export, Reexport, and Transfer (In-Country) to or Within Russia or Belarus Pursuant to § 746.10(a)(1) and (2)

The source for the Schedule B numbers and descriptions in this list is the Bureau of the Census's Schedule B concordance of exports 2022. Census's Schedule B List 2022 can be found at *www.census.gov/foreign-trade/aes/documentlibrary/#concordance.* The Introduction Chapter of the Schedule B provides important information about classifying products and interpretations of the Schedule B, *e.g.,* NESOI means Not Elsewhere Specified or Included. In addition, important information about products within a particular chapter may be found at the beginning of chapters. This supplement includes three columns consisting of the Schedule B, 2-Digit Chapter Heading, and 10-Digit Commodity Description and Per Unit Wholesale Price in the U.S. if applicable to assist exporters, reexporters, and transferors in identifying the products in this supplement. For purposes of § 746.10(a)(1) and (2), a 'luxury good' means any item that is identified in this supplement.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
2203000000	Beverages, spirits and vinegar	BEER MADE FROM MALT.
2204100000	Beverages, spirits and vinegar	SPARKLING WINE OF FRESH GRAPES.
2204212000	Beverages, spirits and vinegar	EFFERVESCENT WINE OF FRSH GRAPE IN CNTR 2L OR LESS.
2204214000	Beverages, spirits and vinegar	GRAPE WINE NESOI NOV 14% ALCOHOL CNTRS 2L OR LESS.
2204217000	Beverages, spirits and vinegar	GRAPE WINE NESOI OVER 14% ALCOHOL CNTRS 2L OR LESS.
2204220020	Beverages, spirits and vinegar	GRAPE WINE NESOI NOV 14% ALCOHOL CNTRS > 2 < 10L.
2204220040	Beverages, spirits and vinegar	GRAPE WINE NESOI OVER 14% ALCOHOL CNTRS > 2 < 10 L.
2204290120	Beverages, spirits and vinegar	GRAPE WINE NESOI NOV 14% ALCOHOL CNTRS OV 10 L.
2204290140	Beverages, spirits and vinegar	GRAPE WINE NESOI OVER 14% ALCOHOL CNTRS OV 10 L.
2204300000	Beverages, spirits and vinegar	GRAPE MUST FERMNTATN PREV/ARRSTD BY ALCOH, EX 2009.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
2205100000	Beverages, spirits and vinegar	VERMOUTH/GRPE WINE FLAVRD WTH PLANTS ETC CTR LE 2L.
2205900000	Beverages, spirits and vinegar	VERMOUTH/GRAPE WINE FLAVORED WTH PLANTS ETC OV 2LS.
2206001500	Beverages, spirits and vinegar	CIDER, WHETHER STILL OR SPARKLING.
2206007000	Beverages, spirits and vinegar	FERMENTED BEVERAGES, NESOI.
2207103000	Beverages, spirits and vinegar	ETHYL ALCOHOL UNDENATURED 80%/HIGHER, FOR BEVERAGE.
2208200000	Beverages, spirits and vinegar	GRAPE BRANDY.
2208306020	Beverages, spirits and vinegar	WHISKIES, BOURBON, CONTAINERS NOT OVER 4 LITERS EA.
2208306040	Beverages, spirits and vinegar	WHISKIES, BOURBON, CONTAINERS OVER 4 LITERS EACH.
2208309025	Beverages, spirits and vinegar	RYE WHISKIES EX BOURBON, IN CONTAINERS NT OVER 4L.
2208309030	Beverages, spirits and vinegar	WHISKIES EX BOURBON, IN CONTAINERS NT OV 4L, NESOI.
2208309040	Beverages, spirits and vinegar	WHISKIES EX BOURBON, CONTAINERS OVER 4 LITERS.
2208400030	Beverages, spirits and vinegar	RUM AND TAFIA, CONTAINERS NOT OVER 4 LITERS EACH.
2208400050	Beverages, spirits and vinegar	RUM AND TAFIA, CONTAINERS OVER 4 LITERS.
2208500000	Beverages, spirits and vinegar	GIN AND GENEVA.
2208600000	Beverages, spirits and vinegar	VODKA.
2208700000	Beverages, spirits and vinegar	LIQUEURS AND CORDIALS.
2208904600	Beverages, spirits and vinegar	KIRSCHWASSER AND RATAFIA.
2208905100	Beverages, spirits and vinegar	TEQUILA.
2208909002	Beverages, spirits and vinegar	OTHER SPIRITUOUS BEVERAGES, NESOI.
2401102020	Tobacco and manufactured tobacco substitutes	CONN. SHADE TOBACCO, NOT STEM/STRIP OV 35% WRAPPER.
2401102040	Tobacco and manufactured tobacco substitutes	TOBACCO NOT STEM/STRIP OVER 35% WRAPPER TOB, NESOI.
2401105130	Tobacco and manufactured tobacco substitutes	FLUE-CURED CIG LEAF TOB NT STEM/STRIP LT 35% WRPPR.
2401105160	Tobacco and manufactured tobacco substitutes	BURLEY CIG LEAF TOBACCO NT STEM/STRIP LT 35% WRPPR.
2401105180	Tobacco and manufactured tobacco substitutes	MARYLAND CIG LEAF TOB NOT STEM/STRIP LT 35% WRPPR.
2401105195	Tobacco and manufactured tobacco substitutes	OTHER CIG LEAF TOB NOT STEM/STRIP LT 35% WRAPPER.
2401105340	Tobacco and manufactured tobacco substitutes	CIGAR BINDER TOBACCO, NOT STEM/STRIP LT 35% WRAPPR.
2401108010	Tobacco and manufactured tobacco substitutes	DARK-FIRED KY/TENN TOB NOT STEM/STRIP LT 35% WRPPR.
2401108020	Tobacco and manufactured tobacco substitutes	VA FIRE/SUN-CURED TOB, NOT STEM/STRIP LT 35% WRPPR.
2401109530	Tobacco and manufactured tobacco substitutes	BLACKFAT TOBACCO, NT STEM/STRIP LT 35% WRAPPER TOB.
2401109570	Tobacco and manufactured tobacco substitutes	TOBACCO NESOI NOT STEM/STRIP, LESS THAN 35% WRPPR.
2401202020	Tobacco and manufactured tobacco substitutes	CONN SHADE TOB STEM/STRIP NT THRESHED OV 35% WRPPR.
2401202040	Tobacco and manufactured tobacco substitutes	TOBACCO NESOI STEM/STRIP NOT THRESHED OV 35% WRPPR.
2401202810	Tobacco and manufactured tobacco substitutes	FLUE-CURED TOB STEM/STRIP NT THRESHED LT 35% WRPPR.
2401202820	Tobacco and manufactured tobacco substitutes	BURLEY TOB STEM/STRIP NOT THRESHED LT 35% WRAPPER.
2401202830	Tobacco and manufactured tobacco substitutes	MARYLAND TOB STEM/STRIP NOT THRESHED LT 35% WRPPR.
2401202970	Tobacco and manufactured tobacco substitutes	CIGAR BIND TOB INC CIGAR LF NT THRESH LT 35% WRAPR.
2401205040	Tobacco and manufactured tobacco substitutes	DARK-FIRED KY/TENN TOB STEM/STRIP NT THRSH LT 35%WR.
2401205050	Tobacco and manufactured tobacco substitutes	VA FIRE/SUN-CURED TOB STEM/STRIP NT THRSH <35% WRPR.
2401205560	Tobacco and manufactured tobacco substitutes	BLACKFAT TOB STEM/STRIP NOT THRESHED LT 35% WRAPPR.
2401205592	Tobacco and manufactured tobacco substitutes	TOB NESOI STEM/STRIP, NOT THRESHED LT 35% WRPR TOB.
2401206020	Tobacco and manufactured tobacco substitutes	CONN SHADE TOB FROM CIGAR LEAF THRESHED STEM/STRIP.
2401206040	Tobacco and manufactured tobacco substitutes	TOBACCO NESOI FROM CIGAR LEAF, THRESHED STEM/STRIP.
2401208005	Tobacco and manufactured tobacco substitutes	CIGARETTE LEAF TOBACCO FLUE-CURED THRSH STEM/STRIP.
2401208011	Tobacco and manufactured tobacco substitutes	TOBACCO FLUE-CURED THRESHED STEMMED/STRIPPED NESOI.
2401208015	Tobacco and manufactured tobacco substitutes	CIGARETTE LEAF TOBACCO, BURLEY, THRESH, STEM/STRIP.
2401208021	Tobacco and manufactured tobacco substitutes	TOBACCO, BURLEY, THRESHED, STEMMED/STRIPPED, NESOI.
2401208030	Tobacco and manufactured tobacco substitutes	MARYLAND TOBACCO, THRESHED, STEMMED/STRIPPED.
2401208040	Tobacco and manufactured tobacco substitutes	DARK-FIRED KENTUCKY/TENN TOBACCO THRESH STEM/STRIP.
2401208050	Tobacco and manufactured tobacco substitutes	VA FIRE-CURED, SUN-CURED TOB THRESHED, STEM/STRIP.
2401208090	Tobacco and manufactured tobacco substitutes	TOBACCO, THRESHED, PARTLY/WHOLLY STEM/STRIP, NESOI.
2401305000	Tobacco and manufactured tobacco substitutes	TOBACCO STEMS.
2401309000	Tobacco and manufactured tobacco substitutes	TOBACCO REFUSE, NESOI.
2402103030	Tobacco and manufactured tobacco substitutes	SMALL CIGARS/CHEROOTS/CIGARILLOS W/TOB LT $.15 EA.
2402107000	Tobacco and manufactured tobacco substitutes	CIGAR/CHEROOT/CIGARILLO CONTAINING TOBACCO NESOI.
2402200000	Tobacco and manufactured tobacco substitutes	CIGARETTES CONTAINING TOBACCO.
2402900000	Tobacco and manufactured tobacco substitutes	CIGAR/CHEROOT/CIGARILLO/CIGS OF TOB SUBSTITS NESOI.
2403110000	Tobacco and manufactured tobacco substitutes	WATER PIPE TOBACCO.
2403190020	Tobacco and manufactured tobacco substitutes	PIPE TOBACCO, IN RETAIL-SIZED PACKAGES.
2403190040	Tobacco and manufactured tobacco substitutes	SMOKING TOBAC, EX/PIPE TOBAC, RETAIL-SIZED PKG, NES.
2403190060	Tobacco and manufactured tobacco substitutes	SMOKING TOBACCO, NESOI.
2403910000	Tobacco and manufactured tobacco substitutes	HOMOGENIZED OR RECONSTITUTED TOBACCO.
2403990030	Tobacco and manufactured tobacco substitutes	CHEWING TOBACCO.
2403990040	Tobacco and manufactured tobacco substitutes	SNUFF AND SNUFF FLOUR.
2403990050	Tobacco and manufactured tobacco substitutes	MFG TOBACCO, SUBSTITUES, FLUE-CURED.
2403990065	Tobacco and manufactured tobacco substitutes	PARTIALLY MANUFACTURED, BLENDED OR MIXED TOBACCO.
2403990075	Tobacco and manufactured tobacco substitutes	MFG TOBACCO & SUBSTITUTES, NESOI, INCL EXTRACTS & ESSENCES.
2404110000	Tobacco and manufactured tobacco substitutes	CONTAINING TOBACCO OR RECON TOBACDO, INTENDED FOR INHALATION W/O COMBUSTION.
2404120000	Tobacco and manufactured tobacco substitutes	CONTAINING NICOTINE, INTENDED FOR INHALATION W/O COMBUSTION.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
2404190000	Tobacco and manufactured tobacco substitutes	PRODUCTS INTENDED FOR INHALATION, NESOI.
2404910000	Tobacco and manufactured tobacco substitutes	NICOTINE PRODUCTS FOR ORAL INTAKE INTO THE HUMAN BODY.
2404920000	Tobacco and manufactured tobacco substitutes	NICOTINE PRODUCTS INTENDED FOR TRANSDERMAL INTAKE INTO THE HUMAN BODY.
2404990000	Tobacco and manufactured tobacco substitutes	NICOTINE PRODUCTS INTENDED FOR INTAKE INTO THE HUMAN BODY, NESOI.
3302900010	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	PERFUME OIL BLENDS, PROD USE FINISHED PERFUME BASE.
3303000000	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	PERFUMES AND TOILET WATERS.
3304100000	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	LIP MAKE-UP PREPARATIONS.
3304200000	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	EYE MAKE-UP PREPARATIONS.
3304910050	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	MAKE-UP POWDER, WHETHER/NT COMPRESSED, NESOI.
3304995000	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	BEAUTY & SKIN CARE PREPARATION, NESOI.
3307900000	Essential oils and resinoids; perfumery, cosmetic or toilet preparations.	PERFUMERY, COSMETIC OR TOILET PREPARATIONS, NESOI.
3916902000	Plastics and articles thereof	RACQUET STRINGS, OF PLASTIC.
3926202500	Plastics and articles thereof	GLOVES SPEC DESIGNED FOR USE IN SPORTS, PLASTIC.
3926400000	Plastics and articles thereof	STATUETTES & OTHER ORNAMENTAL ARTICLES, OF PLASTIC.
3926903000	Plastics and articles thereof	PARTS FOR YACHTS OR PLEASURE BOATS, ETC.
4202110000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	TRUNKS, SUITCASES, ETC, SURFACE COMPS/PATENT LEATHER.
4202120000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	TRUNKS, SUITCASES, ETC, SURFACE PLASTIC/TEXT MATERLS.
4202190000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	TRUNKS, SUITCASES, VANITY CASES ETC, NESOI.
4202210000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	HANDBAGS, SURFACE OF COMPOSITION/PATENT LEATHER.
4202220000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	HANDBAGS, SURFACE OF PLASTIC SHEET/TEXT MATERIALS.
4202290000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	HANDBAGS, NESOI.
4202310000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	ARTICLES FOR POCKET OR HANDBAG, COMP/PATENT LEATHER.
4202320000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	ARTICLES FOR POCKET/HANDBAG, PLASTIC/TEXT MATERIAL.
4202390000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	ARTICLES FOR POCKET OR HANDBAG, NESOI.
4202910010	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	GOLF BAGS, OUTER SURFACE LEATHER.
4202910040	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	OTHER BAGS, OUTER SURFACE COMPS/PATENT LEATH, NESOI.
4202990000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	CASES, BAGS & CONT, OTHER OF MATR/COVERINGS, NESOI.
4203400000	Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut).	OTH CLOTHING ACCESSORIES, LEATHER/COMPOS LEATHER.
4301100000	Furskins and artificial fur; manufactures thereof	MINK FURSKINS, RAW, WHOLE.
4301300000	Furskins and artificial fur; manufactures thereof	ASTRAKHAN, INDIAN, ETC LAMB FURSKINS, RAW, WHOLE.
4301600000	Furskins and artificial fur; manufactures thereof	FOX FURSKINS, RAW, WHOLE.
4301800210	Furskins and artificial fur; manufactures thereof	NUTRIA FURSKINS, RAW, WHOLE.
4301800297	Furskins and artificial fur; manufactures thereof	FURSKINS NESOI, RAW, WHOLE.
4301900000	Furskins and artificial fur; manufactures thereof	HEADS/PCS, CUTTINGS ETC FURSKINS FOR FURRIERS' USE.
4302110000	Furskins and artificial fur; manufactures thereof	MINK FURSKINS, WHOLE, TANNED/DRESSED NOT ASSEMBLED.
4302191300	Furskins and artificial fur; manufactures thereof	PERSIAN ETC LAMB FURSKIN WHOLE TANNED NOT ASSEMBLE.
4302195000	Furskins and artificial fur; manufactures thereof	FURSKINS NESOI, WHOLE TANNED/DRESSED NOT ASSEMBLED.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
4302200000	Furskins and artificial fur; manufactures thereof	FURSKIN PIECES/CUTTINGS TANNED/DRESSED NT ASSEMBLD.
4302300000	Furskins and artificial fur; manufactures thereof	FURSKINS, WHOLE AND PIECES, TANNED, ASSEMBLED.
4303100030	Furskins and artificial fur; manufactures thereof	MINK FURSKIN ARTICLES, APPAREL, CLOTHING ACCESSORY.
4303100060	Furskins and artificial fur; manufactures thereof	FURSKIN ARTICLE APPAREL CLOTHING ACCESSORIES NESOI.
4303900000	Furskins and artificial fur; manufactures thereof	ARTICLES OF FURSKINS, NESOI.
4304000000	Furskins and artificial fur; manufactures thereof	ARTIFICIAL FUR AND ARTICLES THEREOF.
4420110000	Wood and articles of wood; wood charcoal	STATUETTES AND OTHER ORNAMENTS OF TROPICAL WOOD.
4420190000	Wood and articles of wood; wood charcoal	STATUETTES AND OTHER ORNAMENTS, OF WOOD, NESOI.
4907000000	Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans.	UNUSED POSTAGE; BANKNOTES; CHECK FORMS; STOCK, ETC.
5001000000	Silk	SILKWORM COCOONS SUITABLE FOR REELING.
5002000000	Silk	RAW SILK (NOT THROWN).
5003001000	Silk	SILK WASTE, NOT CARDED OR COMBED.
5003009000	Silk	SILK WASTE, OTHER.
5004000000	Silk	SILK YARN NOT PUT UP FOR RETAIL SALE.
5005000000	Silk	YARN SPUN FROM SILK WASTE NOT PUT UP RETAIL SALE.
5006000000	Silk	SILK YARN&YARN/SILK WASTE, RETAIL SALE, SILKWORM GUT.
5007100000	Silk	WOVEN FABRICS OF NOIL SILK.
5007200000	Silk	OTHER FABRICS GE 85% SILK/SILK WASTE, NOT NOIL SILK.
5007900000	Silk	WOVEN FABRICS OF SILK OR SILK WASTE—OTHER NESOI.
5603941000	Wadding, felt and nonwovens; special yarns, twine, cordage, ropes and cables and articles thereof.	NONWOV GT 150G/M2, NT MMF FLOOR COVERING UNDERLAYS.
5701100000	Carpets and other textile floor coverings	CARPETS&OTH TEX FLOOR COVR, WOOL/FINE ANML HR, KNOTD.
5701900000	Carpets and other textile floor coverings	CARPETS&OTH TEX FLOOR COVR, OTH TEX MATERIALS, KNOTD.
5702100000	Carpets and other textile floor coverings	KELEM, SCHUMACKS, KARAMANIE, &SIMILAR HAND-WOVEN RUGS.
5702200000	Carpets and other textile floor coverings	FLOOR COVERINGS OF COCONUT FIBERS (COIR), WOVEN.
5702310000	Carpets and other textile floor coverings	CARPETS, ETC OF WOOL/FINE ANIMAL HR, PILE, NT MADE-UP.
5702320000	Carpets and other textile floor coverings	CARPETS, ETC OF MMF TEXTL MATERIAL, PILE, NOT MADE-UP.
5702390000	Carpets and other textile floor coverings	CARPETS, ETC OF OTHER TEXTL MATERL, PILE, NOT MADE-UP.
5702410000	Carpets and other textile floor coverings	CARPETS, ETC OF WOOL/FINE ANIMAL HAIR, PILE, MADE-UP.
5702420000	Carpets and other textile floor coverings	CARPETS, ETC OF MMF TEXTILE MATERIALSS, PILE, MADE-U.
5702490000	Carpets and other textile floor coverings	CARPETS, ETC OTHR TEX MATRL, PILE, MADE-UP, NOT TUFTED.
5702503000	Carpets and other textile floor coverings	CARPETS, ETC WOOL/FINE ANML HR, WOVN, NOT PILE/MDE-UP.
5702505200	Carpets and other textile floor coverings	TEX CARPETS, WOV NT PILE, MM TEX MAT, NT MADE UP.
5702509000	Carpets and other textile floor coverings	CARPETS, ETC OTHR TEX MAT, WOV, NOT PILE/MADE-UP/TUFT.
5702910000	Carpets and other textile floor coverings	CARPETS, ETC WOOL/FINE ANML HR, WOVN, MADE-UP, NT PILE.
5702920000	Carpets and other textile floor coverings	TEXTILE CARPETS, WOV NO PILE, MMF, MADE UP.
5702990000	Carpets and other textile floor coverings	CARPETS, ETC OTHR TEX MAT, WOV, MADE-UP, NOTPILE/TUFT.
5703100000	Carpets and other textile floor coverings	TEXTILE CARPETS, TUFTED, OF WOOL.
5703210000	Carpets and other textile floor coverings	TURF OF NYLON OR OTHER POLYAMIDES.
5703290000	Carpets and other textile floor coverings	CARPETS, ETC, NYLON/OTHR POLYAMIDES, TUFTD, W/N MDE-UP, NESOI.
5703310000	Carpets and other textile floor coverings	TURF OF OTHER MAN-MADE TEXTILE MATERIALS.
5703390000	Carpets and other textile floor coverings	CARPETS, ETC, TUFTED,W/N MDE-UP, NESOI.
5703900000	Carpets and other textile floor coverings	TEXTILE CARPETS, TUFTED, TEXTILE MATERIALS NESOI.
5704100000	Carpets and other textile floor coverings	TEXTILE CARPETS, FELT, NO TUFT, TILES SUR NOV .3M2.
5704200000	Carpets and other textile floor coverings	TEXTILE CARPETS, FELT, NOT TUFTED, SA 0.3M2 & 1M2.
5704900100	Carpets and other textile floor coverings	TEXTILE CARPETS, FELT, NOT TUFTED, SA OTHER.
5705000000	Carpets and other textile floor coverings	OTHR CARPETS&OTHR TEX FLOOR COV, WHETHR/NOT MADE-UP.
5805000000	Special woven fabrics; tufted textile fabrics; lace, tapestries; trimmings; embroidery.	HAND-WOV TAPESTR WALL HANG USE ONLY GT $251/SQ MTR.
5806393010	Special woven fabrics; tufted textile fabrics; lace, tapestries; trimmings; embroidery.	NAR WOV FAB 85% OR MORE BY WGT SILK, NESOI.
5905000000	Impregnated, coated, covered or laminated textile fabrics; textile articles of a kind suitable for industrial use.	TEXTILE WALL COVERINGS.
6110301070	Articles of apparel and clothing accessories, knitted or crocheted.	M/B SWEATERS OF MMF CONT 25% MORE LEATHER, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6110301080	Articles of apparel and clothing accessories, knitted or crocheted.	W/G VESTS EX SWEATER OF MMF CONT 25% LEATHER, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6110301570	Articles of apparel and clothing accessories, knitted or crocheted.	M/B SWEATERS & SIMILAR ART MMF GE 23% W/FAH KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
6110301580	Articles of apparel and clothing accessories, knitted or crocheted.	W/G SWEATRS, PULLOVRS, SIM ARTS MMF GE 23% W/FAH KNT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6110302070	Articles of apparel and clothing accessories, knitted or crocheted.	M/B SWEATERS & SIM ART MMF GE 30% SLK, SLK WST KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6110302080	Articles of apparel and clothing accessories, knitted or crocheted.	W/G SWEATRS, PULLOVERS, SIM ARTS MMF GE 30% SLK KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112110015	Articles of apparel and clothing accessories, knitted or crocheted.	M/B JACKETS FOR TRACK SUITS ETC COTTON, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112110035	Articles of apparel and clothing accessories, knitted or crocheted.	W/G JACKETS FOR TRACK SUITS ETC OF COTTON, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112110050	Articles of apparel and clothing accessories, knitted or crocheted.	M/B TROUSERS FOR TRACK SUITS OF COTTON, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112110060	Articles of apparel and clothing accessories, knitted or crocheted.	W/G TROUSERS FOR TRACK SUITS OF COTTON, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112120015	Articles of apparel and clothing accessories, knitted or crocheted.	M/B JACKETS FOR TRACK SUITS ETC SYN FIBERS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112120035	Articles of apparel and clothing accessories, knitted or crocheted.	W/G JACKETS FOR TRACK SUITS ETC SYN FIBERS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112120050	Articles of apparel and clothing accessories, knitted or crocheted.	M/B TROUSERS FOR TRACK SUITS OF SYN FIBERS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112120060	Articles of apparel and clothing accessories, knitted or crocheted.	W/G TROUSERS FOR TRACK SUITS OF SYN FIBERS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112191000	Articles of apparel and clothing accessories, knitted or crocheted.	TRACK WARM-UP AND JOGGING SUITS ARTIFICIAL FIB, KT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112192000	Articles of apparel and clothing accessories, knitted or crocheted.	TRACK WARM-UP & JOGGING SUITS OT TEXTILE FIBER, KT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112201000	Articles of apparel and clothing accessories, knitted or crocheted.	SKI SUITS OF MANMADE FIBERS, KNITTED OR CROCHETED, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112202000	Articles of apparel and clothing accessories, knitted or crocheted.	SKI SUITS OF OTHER TEXTILE MATERIALS, KNITTED OR C, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112310000	Articles of apparel and clothing accessories, knitted or crocheted.	MEN'S OR BOYS' SWIMWEAR OF SYNTHETIC FIBERS, KNITT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112390000	Articles of apparel and clothing accessories, knitted or crocheted.	M/B SWIMWEAR OF OTHER TEXTILE MATERIALS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112410000	Articles of apparel and clothing accessories, knitted or crocheted.	WOMEN'S OR GIRLS' SWIMWEAR SYNTHETIC FIBERS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6112490000	Articles of apparel and clothing accessories, knitted or crocheted.	W/G SWIMWEAR OF OTHER TEXTILE MATERIALS, KNIT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6206100000	Articles of apparel and clothing accessories, not knitted or crocheted.	W/G BLOUSES, SHIRTS AND SHIRT BLOUSES SILK, NT KT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6211110000	Articles of apparel and clothing accessories, not knitted or crocheted.	MEN'S OR BOYS' SWIMWEAR, NOT KNITTED OR CROCHETED, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6211120000	Articles of apparel and clothing accessories, not knitted or crocheted.	WOMEN'S OR GIRLS' SWIMWEAR, NOT KNITTED OR CROCHET, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6211201500	Articles of apparel and clothing accessories, not knitted or crocheted.	WATER RESIST SKI-SUITS, NT KNITTED/CROCHETED NESOI, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6213900600	Articles of apparel and clothing accessories, not knitted or crocheted.	HANDKERCHIEFS, OF SILK OR SILK WASTE, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6214100000	Articles of apparel and clothing accessories, not knitted or crocheted.	SHAWLS SCARVES MUFFLERS MANTILLAS SILK SILK WASTE, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6215100000	Articles of apparel and clothing accessories, not knitted or crocheted.	TIES, BOW TIES AND CRAVATS, OF SILK OR SILK WASTE, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6301200000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	BLANKETS (NT ELEC) & TRAVELING RUGS OF WOOL HAIR.
6301300000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	BLANKETS (NT ELEC) & TRAVELING RUGS OF COTTON.
6301400000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	BLNKET (NT ELEC) & TRAVELING RUGS OF SYNTHETIC FIB.
6301900000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	OTHER BLANKETS AND TRAVELING RUGS.
6306221000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	BACKPACKING TENTS OF SYNTHETIC FIBERS.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
6306229000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	TENTS OF SYNTHETIC FIBERS, NESOI.
6306291100	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	TENTS, OF COTTON.
6306292100	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	TENTS OF TEXTILE MATERIALS NESOI.
6306300010	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	SAILS OF SYNTHETIC FIBERS.
6306300020	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	SAILS OF TEXTILE MATERIALS NESOI.
6306901000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	CAMPING GOODS, NESOI, OF COTTON.
6306905000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	CAMPING GOODS OF TEXTILE MATERIALS NESOI.
6307200000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	LIFEJACKETS AND LIFEBELTS.
6308000000	Other made up textile articles; sets; worn clothing and worn textile articles; rags.	NEDCRFT SET WOV FAB & YRN/MAKNG RUG/TAPST PKG RT S.
6401923000	Footwear, gaiters and the like; parts of such articles	WATERPROOF FTWR RUB/PLAS SKI & SNOWBOARD BOOTS, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6402120000	Footwear, gaiters and the like; parts of such articles	SKI, CROSS-CTY&SNOWBOARD BOOTS W/RUBBER OR PLASTIC, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6402190000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR RUB PLAST STITCH SPORTS FOOTWEAR NESOI, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6402991815	Footwear, gaiters and the like; parts of such articles	TENNIS, BASKETBALL, GYM, TRAINING SHOES AND LIKE, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403120000	Footwear, gaiters and the like; parts of such articles	FTWR W/LTHR UPP, SKI, CROSS-CTY & SNOWBOARD BOOTS, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403190000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UPPER, SPORTS FOOTWEAR EXC SKI-BOOTS, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403200000	Footwear, gaiters and the like; parts of such articles	FTWR SOL LTHR UPPER LTHR STRAPS AND AROUND BIG TOE, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403400000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UPPER NESOI WITH A METAL TOE-CAP, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403511100	Footwear, gaiters and the like; parts of such articles	FTWR BASE OF WOOD, LEATHER OUTER SOLE, COV ANK, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403515000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NESOI LEA O SOL ANK COV MEN YOUTH, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403518000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UPPER NESOI LEA O SOL ANKL COV NESOI, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403591000	Footwear, gaiters and the like; parts of such articles	FTWR BASE OF WOOD, LEATHER OUTER SOLE, NT COV ANK, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403595000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP A SOL NESOI NOT ANK COV MEN YOUTH, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403598000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP A SOL NESOI NOT ANK COV NESOI, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403911300	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL ANKLE COV WORK SHOES, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403911500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL ANK TENNIS ETC MEN ETC, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403915000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL ANK COV NESOI MEN YOUTH, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403918500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL ANKCOV NESOI EX MN YTH, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403991500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL NOT ANKL HOUSE SLIPPERS, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
6403992500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL NOT ANKL WORK SHOES, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403993500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL NOTANK TENNIS MEN ETC, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403995000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL NOT ANK NESOI MEN YOUT, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6403998000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR LEA UP NONLEA SOL NOT ANK NESOI EX MN YTH, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6404110000	Footwear, gaiters and the like; parts of such articles	FOOTWEAR TEX UP RUBPLAS SOL SPORT SHOES, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6404202500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR TEX UP LEA SOLE FOR MEN, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6404204500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR TEX UP LEA SOLE FOR WOMEN, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6404206500	Footwear, gaiters and the like; parts of such articles	FOOTWEAR TEX UP LEA SOLE EXCEPT FOR MEN AND WOMEN, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6405100030	Footwear, gaiters and the like; parts of such articles	FTWR W/UPPERS LETHER/COMPOSITION LEATHER MEN, NESOI, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6405100060	Footwear, gaiters and the like; parts of such articles	OTH FTWEAR W UPPERS LEATHER/COMPOSITION LEATHER WM, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6405100090	Footwear, gaiters and the like; parts of such articles	OTH FTWEAR W UPPERS LEATHER/COMP LEATHER OT PERSON, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6506100010	Headgear and parts thereof	ATH, REC AND SPORT SAFETY HEADGEAR, LINED OR TRMED, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6506993000	Headgear and parts thereof	HEADGR OF FURSKIN, WHETHER OR NT LINED/TRIMMD NESOI, AND VALUED AT $1,000 PER UNIT WHOLESALE PRICE IN THE U.S.
6701000000	Prepared feathers and down and articles made of feathers or of down; artificial flowers; articles of human hair.	SKINS & OTHR PTS OF BIRDS W/FEATHERS ETC EXC 0505.
6911101000	Ceramic products	PORCLN/CHINA, HTL/RESTNT & OTHER WARE NOT HH WARE.
6911105500	Ceramic products	TABLE/KITCHENWARE, PORCLN OR CHINA, NT HOTL/RESTNT.
6911900050	Ceramic products	HOUSEHOLD ARTICLES OF PORCELAIN OR CHINA, NESOI.
6913100000	Ceramic products	STATUETTES AND OTHER ORNMNTL ARTCLS, PORCLN OR CHN.
6913900000	Ceramic products	STATUTTES A OTH ORNMNTL CERAM ARTCLS NT PORC/CHINA.
6914100000	Ceramic products	ARTICLES OF PORCELAIN OR CHINA, NESOI.
6914900000	Ceramic products	CERAMIC ARTICLES NESOI.
7013220000	Glass and glassware	STEMWARE DRINKING GLASSES OF LEAD CRYSTAL.
7013330000	Glass and glassware	DRINKING GLASSES OF LEAD CRYSTAL.
7013410000	Glass and glassware	TBL O KTCHN GLSSWR NT DRNKNG GLSS OF LEAD CRYSTAL.
7013910000	Glass and glassware	OTHER GLASSWARE, LEAD CRYSTAL, NESOI.
7101100000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	NATURAL PEARLS, NOT MOUNTED OR SET, INCL TMP STRNG.
7101210000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	CULTURED PEARLS, UNWORKED.
7101220000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	CULTURED PEARLS, WORKED, NOT SET.
7102100000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	DIAMONDS, UNSORTED.
7103102000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	UNWORKED PRECIOUS & SEMI-PREC STONES (EXC DIAMOND).
7103104000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SAWN/ROUGH SHAPE PREC&SEMI-PREC ST(EXC DIAM)NESOI.
7103910000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	RUBIES, SAPPHIRES AND EMERALDS, OTHERWISE WORKED.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
7103991000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GEMSTONES, NESOI, CUT BUT NOT SET SUITBL FR JEWLRY.
7104200000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SYNTHC OR RECNSTRCTD GEMSTONES UNWORKED.
7104901000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SYN/RECON, GEMSTONES, CUT BUT NOT SET FOR JEWELRY.
7104905000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SYN, RCNSTR GMSTONES WRKD NT SUITBL FOR JEWELRY.
7106911010	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SILVER BULLION, UNWROUGHT.
7106911020	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SILVER DORE.
7106915000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	UNWROUGHT SILVER, NESOI.
7106920000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	SILVER, SEMIMANUFACTURED.
7108121010	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GOLD BULLION UNWROUGHT, NONMONETARY.
7108121020	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GOLD DORE, UNWROUGHT, NONMONETARY.
7108125000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GOLD, NESOI, UNWROUGHT, NONMONETARY.
7108135000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GOLD, SEMIMANUFACTURED, NESOI, NONMONETARY.
7113110000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	JEWELRY AND PARTS THEREOF, OF SILVER.
7113190000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	JEWELRY AND PARTS THEREOF, OF OTH PRECIOUS METAL.
7113200000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	JEWELRY AND PARTS, BASE METAL CLAD W PREC METAL.
7114190000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	ARTLS OF GLD OR PLAT NESOI.
7114200000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GOLD/SILVER -SMITHS' ARTCLS A PRTS, BS MTL CL W PM.
7115900000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	OTH PREC METL ARTCLS OR ARTCLS CLAD W PM, NESOI.
7116101000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	ARTICLES OF NATURAL PEARLS.
7116102500	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	ARTICLES OF CULTURED PEARLS.
7116201000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	JEWELRY OF PRECIOUS OR SEMIPRECIOUS STONES.
7116204050	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	ARTICLES OF PRECIOUS OR SEMIPREC STONES, NT JEWLRY.
7117190000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	OTH IMITATION JEWELRY, BASE METAL, INC PR MTL PLTD.
7118100000	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	COIN (EXCPT GOLD COIN) NOT BEING LEGAL TENDER.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
7118900030	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	GOLD COIN NESOI (GOLD CONTENT).
7118900050	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal and articles thereof; imitation jewelry; coin.	COIN (EXCEPT GOLD COIN) NESOI.
7326906000	Articles of iron or steel	OTH ARTIC IOS, CTD OR PLTD W PREC METAL, NESOI.
8306210000	Miscellaneous articles of base metal	STATUETTES A OTH ORNAMNTS A PRTS PLTD W PREC METAL.
8306290000	Miscellaneous articles of base metal	STATUETTES A OTH ORNMNTS A PRTS, BS METL NT PM PLT.
8407210000	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	OUTBOARD ENGINES FOR MARINE PROPULSION.
8407290010	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	SPK-IGN REC OR ROT INT COM PST ENG, MAR, IN/OUTBOARD.
8407290050	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	INBOARD ENG WITH INBOARD DRIVE F MARINE PROPULSION.
8408100010	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	DIESEL ENGINES, NOT EXCEEDING 149.2 KW, MARINE.
8408100020	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	COMP-IGNI PST ENG, MARINE, EXC149.2KW, NOT EXC223.8KW.
8409916000	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	PARTS F SPARK IG ENG FOR MARINE PROPULSION.
8412294000	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	HYDROJET ENGINES FOR MARINE PROPULSION.
8412901000	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	PARTS OF HYDROJET ENGINES FOR MARINE PROPULSION.
8471300100	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.	PORT DGTL ADP MACH, <10 KG, AT LEAST CPU, KBRD, DSPLY.
8703101000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	VEHICLES DESIGNED FOR TRAVELING ON SNOW.
8703210100	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MTR VEH, ONLY SPARK IGN ENG, NOT OV 1,000 CC.
8703220100	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MOTOR VEH, ONLY SPARK IGN ENG, (1,000–1,500 CC).
8703230145	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	VEHICLES, NESOI, NEW, ENG (1,500–3,000 CC) LE 4CYL.
8703230160	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, OV 4 N/O 6 CYL, 1,500–3,000CC.
8703230170	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	3PASS VEH, SPARK IGN, >6 CYL, 1,500–3,000 CC.
8703230190	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	USED VEHICLES, ONLY SK IG (1,500–3,000 CC), NESOI.
8703240140	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN >3,000 CC, 4 CYL & UN.
8703240150	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, ONLY SPK IGN OV 4 N/O 6 CYL, OV 3,000 CC.
8703240160	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, ONLY SPK IGN >6 CYL, >3,000 CC, NEW.
8703240190	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MTR VEH, ONLY SPARK IGN, GT 3,000 CC, USED.
8703310100	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, ONLY COMPR IG, DIESEL, <1,500 CC.
8703320110	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL ENG, ONLY CMP-IG, 1,500–2,500 CC, NEW.
8703320150	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL ENG, ONLY COMP-IG 1,500–2,500 CC, USED.
8703330145	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL, ONLY COMP-IG, >2,500 CC, NEW, NES.
8703330185	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL, ONLY COMP-IG, >2,500 CC, USE, NES.
8703400005	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MOT VEH LT = 1,000 CC SPRK IGN/ELEC NCHRG ENG, NES.
8703400010	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PSSNGR VEH, SPARK IGN AND ELCTC MTR, 1,000–1,500 CC.
8703400020	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPRK IG/ELEC, NCHG, NESOI, 4 CYL, 500–3,000 CC.
8703400030	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH SPK IGN/ELEC, NCHG PL >4 <6 CYL, 1,500–3,000 CC.
8703400040	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	3PASS VEH, SPARK IGN/ELEC, NCHRG >6 CYL, 1,500–3,000CC.
8703400045	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	USED VHCLS, SPRK AND ELCTC ENGN 1,500–3,000 CC NESOI.
8703400060	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC NCHG PLG >3,000 CC, 4 CYL & UN.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
8703400070	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC NCHG PLUG >4 <6 CYL, >3,000 CC.
8703400080	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC, NWCHRG PLG >6 CYL, >3,000 CC.
8703400090	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IG & ELEC NO PLUG, OVER 3,000 CC, USED.
8703500010	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL AND ELEC NO PLUG, <1,500 CC.
8703500030	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESL/ELC (NO PLUG) 1,500–2,500 CC, NEW.
8703500050	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIES/ELEC (NO PLG) ENG, 1,500–2,500 CC, USED.
8703500070	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL/ELEC, >2,500 CC, NEW, NESOI.
8703500090	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESEL/ELEC, >2,500 CC, USED, NESOI.
8703600005	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MOT VEH LT = 1,000 CC SPARK IGN/ELEC CHRG W PLG.
8703600010	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASSVEH, SP-IGN/ELEC W/PLUG ENG, (1,000–1,500 CC).
8703600020	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC, WITH PLUG 4 CYL, 1,500–3,000 CC.
8703600030	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC CHRG PLG >4 <6CYL,,1,500–3,000 CC.
8703600040	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	3PASS VEH, SPRK IGN/ELEC CHRG, >6 CYL, 1,500–3,000 CC.
8703600045	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	USED VEHICLES, SPK/ELEC (1,500–3,000 CC), NESOI.
8703600060	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC CHRG PLUG >3,000 CC, 4 CYL & UN.
8703600070	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC, CHRG PLUG >4, <6 CYL, >3,000 CC.
8703600080	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, SPK IGN/ELEC CHRG PLUG >6 CYL, >3,000 CC.
8703600090	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MTR VEH, SP IGN/ELEC, OVER 3,000 CC, USED.
8703700010	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASSENGER VEHICLES, DIESEL/ELEC, <1,500 CC.
8703700030	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESE/ELEC, OV 1,500 BT NT OV 2,500 CC, NEW.
8703700050	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS VEH, DIESL/ELEC, OV 1500 BT NT OV 2,500 CC, USED.
8703700070	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MOTOR VEH, DIESL/ELECTRIC, >2,500 CC, NEW, NESOI.
8703700090	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASS MOTOR VEH, DIESL/ELECTRI, > 2,500 CC, USED, NESOI.
8703800000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASSENGER MOTOR VEHICLES ONLY ELECTRC MOTOR, NESOI.
8703900100	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PASSENGER MOTOR VEHICLES, NESOI.
8706001520	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	CHASSIS FITTED W/ENG, FOR PASSENGER AUTOMOBILES.
8707100020	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	BODIES FOR PASSENGER AUTOS OF HEADING 8703.
8711200000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	MOTORCYCLES (INCLUDING MOPEDS), CYCL, EXC50CC, NT250C.
8711300000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	MOTORCYCLES (INCLUDING MOPEDS), CYCL, EXC250CC, NT500.
8711400000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	MOTORCYCLES, CYCL, EXC500, NT800CC.
8711500000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	MOTORCYCLES, CYCL, EXCD 800 CC.
8711600000	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	MOTORCYCLES (INCLUDING MOPED) ELECTRIC MOTOR, NESOI.
8711900100	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	MOTORCYCLES (INCLUDING MOPEDS), NESOI.
8714100010	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	SADDLES AND SEATS OF MOTORCYCLES.
8714100090	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.	PARTS, NESOI, OF MOTORCYCLES.

Schedule B	2-Digit chapter heading	10-Digit commodity description and per unit wholesale price in the U.S. if applicable
9020004000	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof.	UNDERWATER BREATHING DEVICES CARRIED ON PERSON.
9101110000	Clocks and watches and parts thereof	WRST WATCH, ELEC OPER, PRECIOUS METAL, MECH DISPLAY.
9101192000	Clocks and watches and parts thereof	WRIST WATCH, ELEC OPER, PRECIOUS METAL, OPTO-ELEC DSP.
9101195000	Clocks and watches and parts thereof	WRIST WATCH, ELECTRICALLY OPER, PRECIOUS METAL, NES.
9101210000	Clocks and watches and parts thereof	WRST WATCH, NT BATTERY, PRECIOUS METAL, AUTOMATIC.
9101290000	Clocks and watches and parts thereof	WRIST WATCHE, NT BATTERY, PRECIOUS METAL W/O AUTOM.
9101910000	Clocks and watches and parts thereof	OTH WATCH, PRECIOUS METAL, ELEC OPR, EXC WRST WATCH.
9101990000	Clocks and watches and parts thereof	OTH WATCH, PRCS METAL, NT BATTERY, EXC WRIST WATCH.
9111100000	Clocks and watches and parts thereof	WTCH CASES, PRCS METAL OR METAL CLAD W PRCS METAL.
9111900000	Clocks and watches and parts thereof	PTS, WATCH CASES OF PRECIOUS METAL OR BASE METAL.
9113100000	Clocks and watches and parts thereof	WATCH BANDS ETC, OF PRCS METAL/METAL CLAD W PRCS MT.
9201200000	Musical instruments; parts and accessories of such articles.	GRAND PIANOS.
9601100000	Miscellaneous manufactured articles	WORKED IVORY AND ARTICLES OF IVORY.
9601900000	Miscellaneous manufactured articles	BONE, HORN, CORAL, ETC & OTH ANIMAL CARVING MATERL.
9602004000	Miscellaneous manufactured articles	MOLDED OR CARVED ARTICLES OF WAX.
9603300000	Miscellaneous manufactured articles	ARTISTS BRUSHES, & SIMILAR BRUSHES FOR COSEMTICS.
9608300039	Miscellaneous manufactured articles	FOUNTAIN PENS, STYLOGRAPH PENS AND OTHER PENS, NESOI.
9616200000	Miscellaneous manufactured articles	POWDER PUFFS & PADS TO APPLY COSMETICS, TOILET PREP.
9701210000	Works of art, collectors' pieces and antiques	PAINTINGS, DRAWING AND PASTELS, OF AN AGE EXCEEDING 100 YEARS.
9701220000	Works of art, collectors' pieces and antiques	MOSAICS OF AN AGE EXCEEDING 100 YEARS.
9701290000	Works of art, collectors' pieces and antiques	COLLAGES & SIMILAR DECORATIVE PLAQUES, OF AN EXCEEDING 100 YEARS.
9701910000	Works of art, collectors' pieces and antiques	PAINTINGS, DRAWING AND PASTELS, OF AN AGE NOT EXCEEDING 100 YEARS.
9701920000	Works of art, collectors' pieces and antiques	MOSAICS, OF AN AGE NOT EXCEEDING 100 YEARS.
9701990000	Works of art, collectors' pieces and antiques	COLLAGES & SIMILAR DECORATIVE PLAQUES, OF AN AGE NOT EXCEEDING 100 YEARS.
9702100000	Works of art, collectors' pieces and antiques	ORIGINAL ENGRAVINGS, PRINTS & LITHOGRAPHS, OF AN AGE EXCEEDING 100 YEARS.
9702900000	Works of art, collectors' pieces and antiques	ORIGINAL ENGRAVINGS, PRINTS & LITHOGRAPHS, OF AN AGE NOT EXCEEDING 100 YEARS.
9703100000	Works of art, collectors' pieces and antiques	ORIGINAL SCULPTURES AND STATUARY, IN ANY MATERIAL, OF AN AGE EXCEEDING 100 YEARS.
9703900000	Works of art, collectors' pieces and antiques	ORIGINAL SCULPTURES AND STATUARY, IN ANY MATERIAL, NOT OF AN AGE EXCEEDING 100 YEARS.
9704000000	Works of art, collectors' pieces and antiques	POSTAGE OR REVENUE STAMPS, FIRSTDAY COVERS.
9705100000	Works of art, collectors' pieces and antiques	COLLECTIONS & CLLCTRS' PCS OF ARCH, ETHNO OR HIST INT.
9705210000	Works of art, collectors' pieces and antiques	HUMAN SPEC AND PARTS THEREOF, OF ZOO, BOT, MIN, ANA OR PALEO INT.
9705220000	Works of art, collectors' pieces and antiques	EXTINCT OR END SPECIES OR PARTS, OF ZOO, BOT, MIN, ANA, OR PALEO INT.
9705290000	Works of art, collectors' pieces and antiques	COLLECTIONS & CLLCTRS' PCS OF ZOO, BOT, MIN, ANA, PALEO INT, NESOI.
9705310030	Works of art, collectors' pieces and antiques	GOLD NUMISMATIC (COLLECTORS') PIECES, OF AN AGE EXCEEDING 100 YEARS.
9705310060	Works of art, collectors' pieces and antiques	NUMISMATIC (COLLECTORS') PIECES, EXCEPT GOLD, OF AN AGE EXCEEDING 100 YEARS.
9705390030	Works of art, collectors' pieces and antiques	GOLD NUMISMATIC (COLLECTORS') PIECES, NESOI.
9705390060	Works of art, collectors' pieces and antiques	NUMISMATIC (COLLECTORS') PIECES, EXCEPT GOLD, NESOI.
9706100000	Works of art, collectors' pieces and antiques	ANTIQUES OF AN AGE EXCEEDING 250 YEARS.
9706900000	Works of art, collectors' pieces and antiques	ANTIQUES OF AN AGE EXCEEDING 100 YEARS BUT NOT EXCEEDING 250 YEARS.

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2022–05604 Filed 3–11–22; 5:00 pm]

BILLING CODE 3510–33–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1610 and 1612

Updates to Telephone and Facsimile Numbers

AGENCY: Equal Employment Opportunity Commission.

ACTION: Technical amendments.

SUMMARY: This document amends the Equal Employment Opportunity Commission's regulations by updating a telephone number and a facsimile number.

DATES: Effective March 16, 2022.

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Assistant Legal Counsel, at (202) 921–2665 or *kathleen.oram@eeoc.gov,* or Erin Norris, Senior Staff Attorney, at (980) 296–1286 or *erin.norris@eeoc.gov,* Office of Legal Counsel, U.S. Equal Employment Opportunity Commission. Requests for this document in an alternative format should be made to the EEOC's Office of Communications and Legislative Affairs at (202) 921–3191 (voice), 1–800–669–6820 (TTY), or 1–844–234–5122 (ASL video phone).

SUPPLEMENTARY INFORMATION: The Equal Employment Opportunity Commission (EEOC or Commission) recently upgraded some of its communication systems and certain telephone and facsimile numbers in use by the agency were changed. As a result, the EEOC's regulations require updating to correct a telephone number and a facsimile number. The telephone number, which is available for use by the public to access information about agency meetings, appears in the EEOC's regulations covering the Government in the Sunshine Act at 29 CFR 1612.7(a). The facsimile number appears in the EEOC's regulations on the Freedom of Information Act (FOIA) at 29 CFR 1610.7(b) and 1610.11(a); this number is one method by which requests or appeals under the FOIA may be submitted to the EEOC Office of Legal Counsel.

List of Subjects in 29 CFR Parts 1610 and 1612

Freedom of information, Government in the Sunshine Act, Equal employment opportunity.

Accordingly, the Equal Employment Opportunity Commission amends 29 CFR parts 1610 and 1612 as follows:

PART 1610—AVAILABILITY OF RECORDS

■ 1. The authority citation for part 1610 continues to read as follows:

Authority: 42 U.S.C. 2000e–12(a), 5 U.S.C. 552 as amended by Pub. L. 93–502, Pub. L. 99–570, and Pub. L. 105–231; for § 1610.15, non-search or copy portions are issued under 31 U.S.C. 9701.

§ 1610.7 [Amended]

■ 2. In § 1610.7 amend paragraph (b) by removing the number ''(202) 653–6034'' and adding in its place the number ''(202) 827–7545''.

§ 1610.11 [Amended]

■ 3. In § 1610.11 amend paragraph (a) by removing the number ''(202) 653–6034'' and adding in its place the number ''(202) 827–7545''.

PART 1612—GOVERNMENT IN THE SUNSHINE ACT REGULATIONS

■ 4. The authority citation for part 1612 continues to read as follows:

Authority: 5 U.S.C. 552b, sec. 713, 78 Stat. 265; 42 U.S.C. 2000e–12.

§ 1612.7 [Amended]

■ 5. In § 1612.7 amend paragraph (a) introductory text by removing the number ''202–663–7100'' and adding in its place the number ''(202) 921–2750''.

Charlotte A. Burrows,

Chair.

[FR Doc. 2022–05502 Filed 3–15–22; 8:45 am]

BILLING CODE 6570–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2021–0307; FRL–9587–02–R3]

Air Plan Approval; Pennsylvania; Allegheny County Area Fine Particulate Matter Clean Data Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a determination that the Allegheny County, Pennsylvania nonattainment area has clean data for the 2012 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS). This clean data determination (CDD) is based upon quality-assured, quality-controlled, and certified ambient air monitoring data showing the area has attained the 2012 annual $PM_{2.5}$ NAAQS based on the 2018–2020 data available in EPA's Air Quality System (AQS) database. Based on this clean data determination, pursuant to EPA's Clean Data Policy, the obligation for Pennsylvania to make submissions to meet certain Clean Air Act (CAA or the Act) attainment plan requirements for the 2012 annual $PM_{2.5}$ NAAQS for the Allegheny County area is suspended for as long as the area continues to attain the 2012 annual $PM_{2.5}$ NAAQS. Following this final action, Pennsylvania's remaining obligation to submit contingency measures in response to EPA's May 14, 2021 conditional approval of Allegheny County's $PM_{2.5}$ attainment plan is suspended. Additionally, the federal implementation plan (FIP) clock, which was triggered by EPA's March 26, 2018 Finding of Failure to Submit an attainment plan for the 2012 $PM_{2.5}$ NAAQS for the Allegheny County Nonattainment Area, is suspended for the remaining contingency measures element conditionally approved as part of EPA's May 14, 2021 action on the Allegheny County $PM_{2.5}$ attainment plan.

DATES: This final action is effective on April 15, 2022.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2021–0307. All documents in the docket are available for inspection at the *Regulations.gov* website, at *https://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2176. Mr. Rehn can also be reached via electronic mail at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, it is intended to refer to the EPA.

Table of Contents

I. Background

On December 14, 2012, the EPA revised the level of the primary annual $PM_{2.5}$ standard, lowering the level from 15.0 micrograms per cubic meter (μg/m³) to 12.0 μg/m³. Effective April 15, 2015, EPA issued area designations for the 2012 annual $PM_{2.5}$ NAAQS.[1] In that action, EPA designated the Allegheny County, Pennsylvania area (Allegheny County Area) as a moderate nonattainment area for the 2012 annual $PM_{2.5}$ NAAQS.[2]

On April 6, 2018, EPA published a ''finding of failure to submit'' under section 110(k) of the CAA, finding that several areas nationwide (including the Allegheny County Area) failed to submit required SIP elements for the 2012 annual $PM_{2.5}$ NAAQS.[3] At that time, Pennsylvania had failed to submit the following specific moderate area SIP elements for the Allegheny County Area: an attainment demonstration; control strategies analysis, including reasonably available control measures (RACM) and reasonably available control technology (RACT); a reasonable further progress (RFP) plan; quantitative milestones; emission inventories, and contingency measures. That finding of failure to submit triggered the sanctions clock under section 179 of the CAA, as well as an obligation under section 110(c) of the CAA for EPA to promulgate a FIP no later than two years from the effective date of the finding, if Pennsylvania had not submitted, and EPA did not approve, the required SIP submission.

Pennsylvania submitted the required Allegheny County Area $PM_{2.5}$ nonattainment plan (or the Allegheny County $PM_{2.5}$ Plan, or simply the Allegheny County Plan) on September 30, 2019. On November 1, 2019, EPA determined the submitted $PM_{2.5}$ Plan to be technically and administratively complete (in accordance with SIP completeness criteria of CAA section 110(k) and 40 CFR part 51, appendix V), correcting the finding of failure to submit deficiency with respect to the missing nonattainment area planning requirements for the Area under the 2012 $PM_{2.5}$ NAAQS and stopping the sanctions clock (but not the FIP clock) triggered by EPA's April 6, 2018 finding. On May 14, 2021 (86 FR 26388), EPA approved elements of the Allegheny County Area $PM_{2.5}$ Plan, except the required contingency measures element of the plan, which EPA conditionally approved. That final $PM_{2.5}$ Plan approval action terminated EPA's FIP obligation for all CAA required nonattainment plan elements except for the contingency measures element. As to the contingency measures element of the Allegheny County Area $PM_{2.5}$ Plan, EPA's May 14, 2021 conditional approval of the plan's contingency measures element suspended EPA's FIP obligation for the duration of the conditional approval of that element. If Pennsylvania timely submits a SIP revision containing approvable contingency measures by May 14, 2022, upon EPA's subsequent approval of that SIP revision, EPA's FIP obligation with respect to the contingency measures element of the Allegheny County Area $PM_{2.5}$ Plan will be terminated.

On September 3, 2021 (86 FR 49497), EPA proposed to determine that the Allegheny County Area is attaining the 2012 $PM_{2.5}$ annual NAAQS under the Clean Data Policy,[4] based on the most recent three years (2018–2020) of valid monitoring data. EPA proposed that, if finalized, the clean data determination would suspend Pennsylvania's obligation to submit the outstanding contingency measure element of the attainment plan for the $PM_{2.5}$ NAAQS for as long as the area continues to attain the 2012 annual $PM_{2.5}$ NAAQS. Additional details can be found in EPA's September 3, 2021 proposed action.[5] Finally, the September 3, 2021 action proposed to suspend the FIP clock triggered by the March 26, 2018, Finding of Failure to Submit action that were not halted by subsequent submittal and EPA approval of most elements of the attainment plan.[6]

II. Response to Public Comments

EPA's September 3, 2021 proposed clean data determination action for the Allegheny County nonattainment area for the $PM_{2.5}$ NAAQS opened a thirty-day public comment period, which closed on October 4, 2021. EPA received comments from three individual commenters. All comments received have been placed in the docket for this action. A summary of the relevant comments received and EPA's responses thereto are listed below.

Comment 1: The commenter stated that while they generally support the proposed clean data determination action, they disagree with the suspension of certain $PM_{2.5}$ plan requirements related to attainment—namely the attainment demonstration, RACM and RACT demonstrations, emission control strategies, RFP plan, quantitative milestones, and contingency measures. Given the lateness of Pennsylvania's submission of the required attainment plan in 2018, the commenter contends that Pennsylvania should adopt these requirements.

Response 1: Under EPA's longstanding Clean Data Policy interpretation as codified for $PM_{2.5}$ at 40 CFR 51.1015, a determination that a $PM_{2.5}$ nonattainment area has attained the NAAQS suspends the state's obligation to submit to EPA those SIP nonattainment planning elements related to attaining that NAAQS for as long as the area continues to attain the standard. Because the purpose of certain nonattainment plan elements is to help bring a violating area into attainment, if data shows that the area has attained, EPA interprets that these requirements should no longer be applicable. For more than two decades, and for many NAAQS, EPA has consistently applied its Clean Data Policy interpretation to attainment-related provisions of subparts 1, 2 and 4 of part D, title I of the CAA. The Clean Data Policy is the subject of several EPA memoranda and regulations and numerous individual rulemakings published in the **Federal Register**. These rulemakings have applied the interpretation to a broad spectrum of ozone, fine particulate matter, lead, and carbon monoxide NAAQS—including the 1997 and 2006 $PM_{2.5}$ NAAQS. The Clean Data Policy has been reviewed and upheld by Federal courts on a number of occasions.[7] The 2016 $PM_{2.5}$ SIP Requirements Rule's Clean Data Policy interpretation with respect to CAA subpart 4 aligns with that implemented under prior fine particulate matter NAAQS.[8] EPA has previously articulated its Clean Data Policy

[1] *See* 80 FR 2206, January 15, 2015.

[2] *See* 40 CFR 81.339.

[3] *See* 83 FR 14759, April 6, 2018.

[4] 40 CFR 51.1015(a).

[5] *See* 86 FR 49497.

[6] *See* 86 FR 26388, May 14, 2021.

[7] The D.C. Circuit has upheld the Clean Data Policy interpretation as embodied in the EPA's 8-hour ozone Implementation Rule at 40 CFR 51.918. *NRDC* v. *EPA,* 571 F. 3d 1245 (D.C. Cir. 2009). Other U.S. Circuit Courts of Appeals that have considered and reviewed the EPA's Clean Data Policy interpretation have upheld it and the rulemakings applying the EPA's interpretation. *Sierra Club* v. *EPA,* 99 F.3d 1551 (10th Cir. 1996); *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Cir. 2004); *Our Children's Earth Foundation* v. *EPA,* N. 04–73032 (9th Cir. June 28, 2005) (memorandum opinion); *Latino Issues Forum,* v. *EPA,* Nos. 06–75831 and 08–71238 (9th Cir. March 2, 2009) (memorandum opinion).

[8] *See* 81 FR 58010 (August 24, 2016) and 40 CFR 51.1015.

interpretation under CAA subpart 4 in implementing the PM_{10} standard.[9]

As described in the proposed action, the clean data determination does not suspend other CAA nonattainment plan requirements, such as an emissions inventory, nonattainment new source review requirements, and certain emission reduction requirements, that are considered independent of attainment. In any case, EPA's May 14, 2021, approval of Allegheny County's Plan for the 2012 Annual $PM_{2.5}$ NAAQS fully approved all required moderate area nonattainment plan elements—including nearly all elements referenced by the commenter—except for the contingency plan, which was conditionally approved.[10] Therefore, those SIP-approved plan elements for the 2012 $PM_{2.5}$ NAAQS are in place and in effect, regardless of the subsequent suspension of the obligation to submit them pursuant to this clean data determination. In the case of the contingency measures element of the $PM_{2.5}$ plan, which EPA conditionally approved, the clean data determination suspends the requirement to submit a SIP revision addressing that element as long as the area continues to attain the 2012 Annual $PM_{2.5}$ NAAQS.[11] Under the Clean Data Policy and the regulations adopted to address $PM_{2.5}$, suspended plan elements would be permanently discharged if the area is redesignated to attainment.[12]

Comment 2: The commenter contends that because many states failed to submit required SIP nonattainment plan elements to EPA in a timely manner, it is important that EPA establish a FIP under the authority of the CAA as a supplement to the SIP, and to step in to meet nonattainment planning requirement commitments on behalf of the states, if need be, and that the process for doing so be transparent to the public.

Response 2: As discussed in the prior response, Pennsylvania did submit a moderate $PM_{2.5}$ attainment plan, and EPA approved all the elements of that plan except for the contingency measures, which were conditionally approved. Full approval also means that these elements of the plan are in the SIP and federally enforceable. The purpose of a CAA section 110(c)(1) FIP is to provide a backstop where a state has failed to make a required submission or where EPA has disapproved a state's plan or found such plan to be deficient; in this case, where EPA has fully approved the state's plan, a FIP is not provided for under the CAA.

Regarding the contingency measures element, EPA's conditional approval requires the state to submit a SIP to remedy the conditional approval of the contingency measure plan element no later than May 14, 2022.[13] EPA's approval of the SIP revision addressing contingency measures would terminate the FIP clock for that outstanding plan element. However, upon the effective date of this Clean Data Determination, the requirement to submit the contingency measures element of the attainment SIP and EPA's FIP requirement for that element are suspended as long as the Allegheny County Area continues to attain the 2012 Annual $PM_{2.5}$ NAAQS.[14]

III. Final Action

EPA is finalizing this Clean Data Determination, under the Clean Data Policy, as proposed. Pursuant to 40 CFR 51.1015, EPA has determined that based on 3-years of certified, complete, and valid ambient air monitoring data between 2018 and 2020, the Allegheny County Area has attained the 2012 annual $PM_{2.5}$ NAAQS. Therefore, Pennsylvania's obligation to submit the attainment plan elements referenced in 40 CFR 51.1015(a)—including the conditionally approved contingency measures element of the attainment plan—are suspended as long as the area continues to attain the 2012 annual $PM_{2.5}$ NAAQS. For the Allegheny Area, EPA has already approved into the SIP the attainment demonstration, projected emissions inventories, RACM (including RACT), RFP plans, motor vehicle emissions budgets, and quantitative milestones for the Allegheny Area. The requirement to submit the conditionally approved contingency measures element is suspended until such time as: (1) EPA determines that the area has violated the 2012 Annual $PM_{2.5}$ NAAQS; (2) the area is redesignated to attainment, after which such requirements are permanently discharged; or (3) EPA determines that the area attained by its attainment date of December 31, 2021.[15]

Although the plan submittal obligation has been suspended, this clean data determination action does not preclude Pennsylvania from submitting, nor the EPA from acting upon, the suspended attainment plan element. As a result of this final action, the FIP clock triggered by the EPA's March 26, 2018, Finding of Failure to Submit are suspended.[16]

This final action does not constitute a redesignation of the Allegheny County nonattainment area to attainment for the 2012 annual $PM_{2.5}$ NAAQS under CAA section 107(d)(3) because Pennsylvania has not yet submitted a request for redesignation or a maintenance plan for the Area and EPA has not approved a maintenance plan for the Allegheny County Area meeting the requirements of section 175A of the CAA, nor has EPA determined that the Area has met the other CAA requirements for redesignation. The classification and designation status in 40 CFR part 81 remains Moderate nonattainment for this area until such time as the EPA determines that Pennsylvania has met the CAA requirements for redesignation to attainment for the Allegheny County $PM_{2.5}$ Area.

IV. Statutory and Executive Order Reviews

A. General Requirements

This action finalizes a clean data determination based on attainment of air quality and suspends certain Federal nonattainment planning requirements. This action imposes no new Federal requirements and imposes no additional requirements beyond those imposed by state law. For this reason, this final action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

[9] *See, e.g.,* 75 FR 27944 (May 19, 2010) (determination of attainment of the PM_{10} standard in Coso Junction, California); 71 FR 13021 (March 14, 2006) (Yuma, Arizona area); 71 FR 40023 (July 14, 2006) (Weirton, West Virginia area); 71 FR 44920 (August 8, 2006) (Rillito, Arizona area); 71 FR 63642 (October 30, 2006) (San Joaquin Valley, California area) 72 FR 14422 (March 28, 2007) (Miami, Arizona area). In the EPA's proposed and final rulemakings determining that the San Joaquin Valley nonattainment area attained the PM_{10} standard, the EPA set forth at length its rationale for applying the Clean Data Policy to PM_{10} under subpart 4. 71 FR at 63643–45. The Ninth Circuit upheld the EPA's final rule, and specifically the EPA's Clean Data Policy, in the context of subpart 4. *Latino Issues Forum* v. *EPA,* supra. Nos. 06–75831 and 08–71238 (9th Cir. March 2, 2009) (memorandum opinion).

[10] *See* 86 FR 26388 (May 14, 2021).

[11] *Ibid.*

[12] *See* 40 CFR 51.1015(a).

[13] *See* 40 CFR 52.2023(n).

[14] *See* 86 FR 26388 (May 14, 2021).

[15] *See Bahr* v. *Regan,* 6 F.4th 1059, 1083 (9th Cir. 2021).

[16] *See* 83 FR 14759.

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because this action imposes no new requirements to apply in Indian country located in the State, and EPA notes that this action will not impose direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 16, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action.

This action to determine attainment, under the Clean Data Policy, of Allegheny County nonattainment area for the 2012 Annual $PM_{2.5}$ NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

Diana Esher,

Acting Regional Administrator, Region III.

[FR Doc. 2022–05446 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2017–0041; FRL–9572–01–R9]

Approval of Arizona Air Plan Revisions, Arizona Department of Environmental Quality and Maricopa County Air Quality Department

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Arizona Department of Environmental Quality (ADEQ) and Maricopa County Air Quality Department (MCAQD) portions of the Arizona State Implementation Plan (SIP). These revisions were submitted by ADEQ and MCAQD in response to the EPA's June 12, 2015 finding of substantial inadequacy and SIP call for certain provisions in the SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. The EPA is finalizing approval of the SIP revisions because the Agency has determined that they are in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or the Act) and correct deficiencies identified in the June 12, 2015 SIP call.

DATES: These rules are effective on April 15, 2022.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2017–0041. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, EPA Region IX, (415) 947–4125, *vineyard.christine@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Background

On February 22, 2013, the EPA issued a **Federal Register** notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' hereafter referred to as the ''2015 SSM SIP Action.'' [2] The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. The EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

The EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[3] Importantly, the 2020 Memorandum stated that it ''did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.'' Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to ADEQ and MCAQD in 2015. It also did not alter the EPA's prior proposal from 2017 to approve the ADEQ and MCAQD SIP revisions at issue in this action. The 2020 Memorandum did, however, indicate the EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether the EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced the EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).[4] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.[5] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including ADEQ's and MCAQD's SIP submittal, provided in response to the 2015 SIP call.

With regards to ADEQ and MCAQD, the SIP call identified R18–2–310 and Rule 140 because they contained improper affirmative defenses for excess emissions during startup, shutdown, and malfunction events. On March 9, 2017, the EPA proposed to approve removal of R18–2–310 and Rule 140 from the Arizona SIP.[6]

Local agency	Rule No.	Rule title	Removed from state law	Submitted
ADEQ	R18–2–310	Affirmative Defense for Excess Emissions Due to Malfunctions, Startup, and Shutdown.	09/07/16	11/17/16
MCAQD	140	Excess Emissions	08/17/16	11/18/16

As discussed in the proposal, EPA proposed to approve the removal of R18–2–310 and Rule 140 from the ADEQ and MCAQD portions of the Arizona SIP because such removal is consistent with CAA requirements and would correct the deficiency identified by the Agency in the 2015 SSM SIP Action.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. EPA acknowledges that over four years have elapsed since the comment period closed. No additional comment period is needed because nothing in the intervening time period—including the issuance and subsequent withdrawal of the 2020 Memorandum—changed the basis for EPA's proposed action or the public's opportunity to view and comment on that basis. Accordingly, the March 9, 2017 notice provided the public with a full opportunity to comment on the issues raised by the proposed action. Three comments expressed support for the proposed action. A summary of the fourth comment from the Salt River Project Agricultural Improvement and Power District (''SRP'' or ''commenter'') and EPA's response is provided below.

Comment: The commenter states that it is inappropriate for the EPA to finalize its proposed approval of Arizona's response to the SSM SIP call until litigation before the United State Court of Appeals for the District of Columbia (D.C. Circuit) is resolved. In support of this claim, the commenter states that if the D.C. Circuit rules in favor of the petitioners who have challenged the 2015 SSM SIP call, the Arizona SIP will need to be revised again to reinsert the SSM provisions.

Response: The EPA respectfully disagrees with this comment. The Agency acknowledges that there exist pending challenges to the 2015 SSM SIP action in the D.C. Circuit. However, there is no requirement or expectation that EPA must postpone action while awaiting a court decision. ADEQ and MCAQD have submitted SIP revisions to the Agency that are fully approvable for

[2] 80 FR 33839.

[3] October 9, 2020, memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator.

[4] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

[5] 80 FR 33985.

[6] 82 FR 13084.

the reasons outlined in the 2017 proposal notice. As a result, EPA has determined that it is appropriate to take action to approve the ADEQ and MCAQD SIP revisions in accordance with applicable CAA requirements. Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). The commenter has pointed to no alleged deficiency or other aspect that would lead the Agency to determine that the SIP revisions should be disapproved or that full approval of the SIP revisions is not otherwise appropriate.

We are also not persuaded by the commenter's assertion that the ADEQ and MCAQD portions of the Arizona SIP will need to be revised if the D.C. Circuit rules in favor of the petitioners. The CAA contains no requirement that affirmative defense provisions be included in SIPs. Therefore, there would be no obligation on states to submit such provisions, regardless of the outcome in the D.C. Circuit litigation.

As we recently reaffirmed in the 2021 Memorandum, EPA is implementing policy consistent with that outlined in the 2015 SSM SIP Action. That policy aligns with previous court decisions, including the D.C. Circuit's ruling in 2008, which found that inclusion of SSM exemptions in section 112 standards is not allowed under the CAA due to the generally applicable definition of emission limitations.[7] Additionally, in 2014 the D.C. Circuit vacated a provision in EPA regulations that allowed an affirmative defense if it met specific criteria. The court stated that EPA lacked authority to create such a defense because it would impermissibly encroach upon the authority of federal courts to find liability or impose remedies.[8] It was in light of the 2008 and 2014 court cases, as well as concerns about the public health impacts of SSM, that led EPA in its 2015 action to clarify and update its SSM policy to explain that automatic exemptions, discretionary exemptions, overly broad enforcement discretion provisions, and affirmative defense provisions like the ones at issue in today's action, will generally be viewed as inconsistent with CAA requirements.

III. EPA Action

No comments were submitted that change our assessment of the rules as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act and for the reasons identified in the 2017 proposal, the EPA is fully approving the removal of these rules from the ADEQ and MCAQD portions of the Arizona SIP. The Agency's final approval of this submission fully corrects the inadequacies in the ADEQ and MCAQD portions of the Arizona SIP that were identified in the EPA's 2015 SSM SIP Action.

IV. Incorporation by Reference

In this document, the EPA is amending regulatory text that includes incorporation by reference. As described in Section I, Background, of this preamble and set forth in the amendments to 40 CFR part 52 below, EPA is removing provisions from the Arizona Administrative Code and Maricopa County portions of the Arizona State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. The EPA has made and will continue to make the State Implementation Plan generally available through *www.regulations.gov* and at the EPA Region 9 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 16, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does

[7] *Sierra Club* v. *Johnson* 551 F.3d 1019 (D.C. Cir. 2008).

[8] *NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 8, 2022.

Martha Guzman Aceves,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

■ 2. In § 52.120, amend paragraph (c) by:
■ a. In Table 2 removing the entry for ''R18–2–310'', and
■ b. In Table 4 removing the entry for ''Rule 140''.

[FR Doc. 2022–05367 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–OLEM–2021–0454, 0456, 0457, 0458, 0459, 0460, 0461, 0462, 0464, 0465, 0466 and 0467; FRL–9184–01–OLEM]

National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA'' or ''the Act''), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan (''NCP'') include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The National Priorities List (''NPL'') constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency (''the EPA'' or ''the agency'') in determining which sites warrant further investigation. These further investigations will allow the EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule adds 12 sites to the NPL, 11 to the General Superfund section and one to the Federal Facilities section.

DATES: The rule is effective on April 15, 2022.

ADDRESSES: Contact information for the EPA Headquarters:

- Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue NW; William Jefferson Clinton Building West, Room 3334, Washington, DC 20004, 202/566–0276.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (202) 566–1048, email: *jeng.terry@epa.gov,* Site Assessment and Remedy Decisions Branch, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation (Mailcode 5204T), U.S. Environmental Protection Agency; 1200 Pennsylvania Avenue NW, Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

The contact information for the regional dockets is as follows:

- Holly Inglis, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; 617/918–1413.
- James Desir, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212/637–4342.
- Lorie Baker, Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, Library, 1650 Arch Street, Mailcode 3HS12, Philadelphia, PA 19103; 215/814–3355.
- Sandra Bramble, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street SW, Mailcode 9T25, Atlanta, GA 30303; 404/562–8926.
- Todd Quesada, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA Superfund Division Librarian/SFD Records Manager SRC–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; 312/886–4465.
- Michelle Delgado-Brown, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1201 Elm Street, Suite 500, Mailcode SED, Dallas, TX 75270; 214/665–3154.
- Kumud Pyakuryal, Region 7 (IA, KS, MO, NE), U.S. EPA, 11201 Renner Blvd., Mailcode SUPRSTAR, Lenexa, KS 66219; 913/551–7956.
- Victor Ketellapper, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mailcode 8EPR–B, Denver, CO 80202–1129; 303/312–6578.
- Eugenia Chow, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mailcode SFD 6–1, San Francisco, CA 94105; 415/972–3160.
- Ken Marcy, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 6th Avenue, Suite 155, Mailcode 12–D12–1, Seattle, WA 98101; 206/890–0591.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. What are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 (''CERCLA'' or ''the Act''), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (''SARA''), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What is the NCP?

To implement CERCLA, the EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan (''NCP''), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances, or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. The EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes ''criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action.'' ''Removal'' actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of ''releases'' and the highest priority ''facilities'' and requires that the NPL be revised at least annually. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is of only limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by the EPA (the ''General Superfund section'') and one of sites that are owned or operated by other Federal agencies (the ''Federal Facilities section''). With respect to sites in the Federal Facilities section, these sites are generally being addressed by other federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each Federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody or control, although the EPA is responsible for preparing a Hazard Ranking System (''HRS'') score and determining whether the facility is placed on the NPL.

D. How are sites listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (see 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which the EPA promulgated as appendix A of the NCP (40 CFR part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), the EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. On January 9, 2017 (82 FR 2760), a subsurface intrusion component was added to the HRS to enable the EPA to consider human exposure to hazardous substances or pollutants and contaminants that enter regularly occupied structures through subsurface intrusion when evaluating sites for the NPL. The current HRS evaluates four pathways: Ground water, surface water, soil exposure and subsurface intrusion, and air. As a matter of agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Each state may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each state as the greatest danger to public health, welfare or the environment among known facilities in the state. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- The EPA determines that the release poses a significant threat to public health.
- The EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

The EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What happens to sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the ''Superfund'') only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). (''Remedial actions'' are those ''consistent with a permanent remedy, taken instead of or in addition to removal actions'' (40 CFR 300.5).) However, under 40 CFR 300.425(b)(2), placing a site on the NPL ''does not imply that monies will be expended.'' The EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL define the boundaries of sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify

releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA ''facility'' is broadly defined to include any area where a hazardous substance has ''come to be located'' (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the ''boundaries'' of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (*e.g.,* the ''Jones Co. Plant site'') in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (*e.g.,* it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (*e.g.,* where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the ''site''). The ''site'' is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination; and is not meant to constitute any determination of liability at a site. For example, the name ''Jones Co. plant site,'' does not imply that the Jones Company is responsible for the contamination located on the plant site.

EPA regulations provide that the remedial investigation (''RI'') ''is a process undertaken . . . to determine the nature and extent of the problem presented by the release'' as more information is developed on site contamination, and which is generally performed in an interactive fashion with the feasibility study (''FS'') (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination ''has come to be located'' before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted previously, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of property, it can submit supporting information to the agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How are sites removed from the NPL?

The EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that the EPA shall consult with states on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment and taking of remedial measures is not appropriate.

H. May the EPA delete portions of sites from the NPL as they are cleaned up?

In November 1995, the EPA initiated a policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What is the Construction Completion List (CCL)?

The EPA also has developed an NPL construction completion list (''CCL'') to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved; (2) the EPA has determined that the response action should be limited to measures that do not involve construction (*e.g.,* institutional controls); or (3) the site qualifies for deletion from the NPL. For more information on the CCL, see the EPA's internet site at *https://www.epa.gov/superfund/construction-completions-national-priorities-list-npl-sites-number.*

J. What is the Sitewide Ready for Anticipated Use measure?

The Sitewide Ready for Anticipated Use measure represents important Superfund accomplishments, and the measure reflects the high priority the EPA places on considering anticipated future land use as part of the remedy selection process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, OSWER 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. The EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment for current and future land uses, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *https://www.epa.gov/superfund/about-superfund-cleanup-process#reuse.*

K. What is state/tribal correspondence concerning NPL listing?

In order to maintain close coordination with states and tribes in the NPL listing decision process, the EPA's policy is to determine the position of the states and tribes regarding sites that the EPA is considering for listing. This consultation process is outlined in two memoranda that can be found at the following website: *https://www.epa.gov/*

superfund/statetribal-correspondence-concerning-npl-site-listing.

The EPA has improved the transparency of the process by which state and tribal input is solicited. The EPA is using the Web and where appropriate more structured state and tribal correspondence that: (1) Explains the concerns at the site and the EPA's rationale for proceeding; (2) requests an explanation of how the state intends to address the site if placement on the NPL is not favored; and (3) emphasizes the transparent nature of the process by informing states that information on their responses will be publicly available.

A model letter and correspondence between the EPA and states and tribes where applicable, is available on the EPA's website at *https://www.epa.gov/superfund/statetribal-correspondence-concerning-npl-site-listing.*

II. Availability of Information to the Public

A. May I review the documents relevant to this final rule?

Yes, documents relating to the evaluation and scoring of the sites in this final rule are contained in dockets located both at the EPA headquarters and in the EPA regional offices.

An electronic version of the public docket is available through *https://www.regulations.gov* (see table below for docket identification numbers). Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facilities identified in section II.D.

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/county, state	Docket ID No.
Westside Lead	Atlanta, GA	EPA–HQ–OLEM–2021–0454.
North 5th Street Groundwater Contamination	Goshen, IN	EPA–HQ–OLEM–2021–0456.
Lower Neponset River	Boston/Milton, MA	EPA–HQ–OLEM–2021–0457.
Bear Creek Sediments	Baltimore County, MD	EPA–HQ–OLEM–2021–0458.
Michner Plating—Mechanic Street	Jackson, MI	EPA–HQ–OLEM–2021–0459.
Southeast Hennepin Area Groundwater and Vapor	Minneapolis, MN	EPA–HQ–OLEM–2021–0460.
Meeker Avenue Plume	Brooklyn, NY	EPA–HQ–OLEM–2021–0461.
Bradford Island	Cascade Locks, OR	EPA–HQ–OLEM–2021–0462.
Galey and Lord Plant	Society Hill, SC	EPA–HQ–OLEM–2021–0464.
National Fireworks	Cordova, TN	EPA–HQ–OLEM–2021–0465.
Unity Auto Mart	Unity, WI	EPA–HQ–OLEM–2021–0466.
Paden City Groundwater	Paden City, WV	EPA–HQ–OLEM–2021–0467.

B. What documents are available for review at the EPA headquarters docket?

The headquarters docket for this rule contains the HRS score sheets, the documentation record describing the information used to compute the score, a list of documents referenced in the documentation record for each site and any other information used to support the NPL listing of the site.

C. What documents are available for review at the EPA regional dockets?

The EPA regional dockets contain all the information in the headquarters docket, plus the actual reference documents containing the data principally relied upon by the EPA in calculating or evaluating the HRS score. These reference documents are available only in the regional dockets.

D. How do I access the documents?

You may view the documents, by appointment only, after the publication of this rule. The hours of operation for the headquarters docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays. Please contact the regional dockets for hours. For addresses for the headquarters and regional dockets, see **ADDRESSES** section in the beginning portion of this preamble.

E. How may I obtain a current list of NPL sites?

You may obtain a current list of NPL sites via the internet at *https://www.epa.gov/superfund/national-priorities-list-npl-sites-site-name* or by contacting the Superfund docket (see contact information in the beginning portion of this document).

III. Contents of This Final Rule

A. Additions to the NPL

This final rule adds the following 12 sites to the NPL, 11 to the General Superfund section and one to the Federal Facilities section. All of these sites are being added to the NPL based on an HRS score of 28.50 or above.

GENERAL SUPERFUND SECTION

State	Site name	City/county
GA	Westside Lead	Atlanta.
IN	North 5th Street Groundwater Contamination	Goshen.
MA	Lower Neponset River	Boston/Milton.
MD	Bear Creek Sediments	Baltimore County.
MI	Michner Plating—Mechanic Street	Jackson.
MN	Southeast Hennepin Area Groundwater and Vapor	Minneapolis.
NY	Meeker Avenue Plume	Brooklyn.
SC	Galey and Lord Plant	Society Hill.
TN	National Fireworks	Cordova.
WI	Unity Auto Mart	Unity.
WV	Paden City Groundwater	Paden City.

FEDERAL FACILITIES SECTION

State	Site name	City/county
OR	Bradford Island	Cascade Locks.

B. What did the EPA do with the public comments it received?

The EPA reviewed all comments received on the sites in this rule and responded to all relevant comments. The EPA is adding 12 sites to the NPL in this final rule. All 12 sites were proposed for addition to the NPL on September 9, 2021 (86 FR 50515).

Comments on the Westside Lead and Bradford Island sites are being addressed in response to comment support documents available in the public docket concurrently with this rule. To view public comments on these sites, as well as the EPA's responses, please refer to the support documents available per docket ID number at *https://www.regulations.gov.* Below is a summary of significant comments received on the remaining sites.

Paden City Groundwater:

The EPA received seven comments on the Paden City Groundwater site. One comment did not oppose adding the site to the NPL and one comment supported listing. Five comments, in support of listing Paden City Groundwater, were erroneously received in the dockets for Westside Lead, Bear Creek Sediments, and Bradford Island. Two additional comments were received in the Paden City Groundwater docket but were comments directed at the Meeker Avenue Plume and Galey and Lord Plant sites. Three comments supported listing the Paden City Groundwater site and expressed concerns related to the health impacts of tetrachloroethylene (PCE) contamination in groundwater, and one comment also expressed concerns about the financial impact of the need to purchase clean drinking water due to contaminated tap water. One commenter submitted comments regarding possible contamination in a basement and inquired whether there should be concern regarding the contamination.

Following listing, the EPA will be conducting additional sampling to determine the extent of the contamination, determine what actual risks are associated with the site, and take necessary actions to address any health impacts. The EPA performs a comprehensive risk assessment for the site as part of further investigations that typically follow listing. A subsequent stage of the Superfund process, the remedial investigation (RI), characterizes conditions and hazards at the site more comprehensively. The results of risk assessment activities will be considered during the evaluation of the need for remedial actions at the site. Additionally, the EPA has contacted one resident directly to address specific health concerns and to discuss the location of their properties in relation to the site contamination.

National Fireworks:

The EPA received three comments on the National Fireworks site from two private citizens and one non-profit organization. One private citizen and the non-profit organization expressed support for listing the National Fireworks site on the NPL due the presence of contaminated groundwater. The non-profit organization stated that it was concerned that per- and polyfluorinated substances (PFAS) may be present in the groundwater in addition to chlorinated solvents due the former use of industrial degreasers at the site. The third commenter, a private citizen, did not oppose adding the site to the NPL but expressed opposition to the rationale for listing the site. The commenter stated that the study used to support listing contained inaccuracies and attributed contamination to an operation that was present for only two years even though other possible origins of the contamination existed. The commenter asserted that these other possible origins included an industrial park that had operated for 35 years and a railroad that operated in area until the mid-1990s.

The National Fireworks site qualifies for addition to the NPL because it has achieved an HRS score of 28.50 or greater, as is demonstrated in the HRS documentation record at proposal. Achieving a site score of greater than 28.50 indicates that the site is eligible for inclusion on the NPL and therefore may warrant further investigation. The HRS documentation record at proposal outlines the specific rationale for attributing the observed release to groundwater to the site consistent with the requirements in the HRS. The requirements in the HRS state that ''some portion of the release must be attributable to the site.'' As indicated in the attribution section of the HRS documentation record at proposal, attribution of at least some of the release is supported, in part, by the detection of explosives, which are unique to munitions manufacturing, in soil collected from the burn pit at the National Fireworks facility, demonstrating a lack of containment.

The HRS documentation record at proposal outlines the specific rationale for attributing the groundwater contamination to the manufacturing of explosives during World War II. Attribution of at least some of the contamination detected in groundwater is supported by the identification of the same contaminants in groundwater that were in site sources and the detection of explosives, which are unique to munitions manufacturing, in soil collected from the burn pit at the National Fireworks facility.

The EPA will be conducting additional sampling to determine the extent of the contamination. If additional source areas are discovered, as the third commenter insists, EPA will fully investigate and clean up those additional source areas. A subsequent stage of the Superfund process, the remedial investigation (RI), characterizes conditions and hazards at the site more comprehensively.

Galey and Lord Plant:

The EPA received a total of 16 comments submitted by private citizens, the mayor of the Town of Society Hill, the governing body of Darlington County, and the owners of a local farm near the Galey and Lord Plant site. One additional comment was received in the docket but was intended for the Southeast Hennepin Area Groundwater and Vapor docket and supported listing of that site. One comment from the governing body of Darlington County in support of listing the site was received but was submitted to the Paden City Groundwater docket. Comments received did not oppose adding the Galey and Lord Plant site to the NPL. The mayor of the Town of Society Hill submitted a comment that expressed support for listing and concern for human health, wildlife, and waterways. Two private citizens and the owners of the local farm submitted comments regarding the health impacts associated with contamination from the Galey and Lord facility. One of the commenters expressed concern for impacts to the commenter's health experienced directly following consumption of local well water. One comment from a private citizen on areas not a part of the site also included specific concerns

regarding the impact of perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) in groundwater. In addition to commenting on health impacts, the owners of the local farm expressed general concerns regarding the impact of contamination on its property and specific concern over the economic impact of the site and cleanup actions on its business. This commenter requested input about the party that initiated the cleanup process for this site. The South Carolina Department of Health and Environmental Control referred the Galey and Lord site to EPA for NPL consideration following an assessment of the plant site and the discovery of contamination in private drinking water wells near the fields where wastewater sludge from the plant was disposed of.

Following listing, the EPA will be conducting additional sampling to determine the extent of the contamination, determine what actual risks are associated with the site, and take necessary actions to address any health impacts. A subsequent stage of the Superfund process, the remedial investigation (RI), characterizes conditions and hazards at the site more comprehensively. The EPA performs a comprehensive risk assessment for the site as part of further investigations that typically follow listing. The results of risk assessment activities will be considered during the evaluation of the need for remedial actions at the site. The EPA has contacted the concerned individual directly to address their specific health concerns.

Regarding economic impacts, the EPA notes that there are both costs and benefits that can be associated with listing a site. Among the benefits are increased health and environmental protection as a result of increased public awareness of potential hazards. In addition to the potential for federally financed remedial actions, the addition of a site to the NPL could accelerate privately financed, voluntary cleanup efforts. Listing sites as national priority targets also may give states increased support for funding responses at particular sites. As a result of the additional CERCLA remedies, there will be lower human exposure to high-risk chemicals, and higher quality surface water, ground water, soil, and air. Therefore, it is possible that any perceived or actual negative fluctuations in property values or development opportunities that may result from contamination may also be countered by positive fluctuations when a CERCLA investigation and any necessary cleanup are completed.

Bear Creek Sediments:

The EPA received 13 comments on the Bear Creek Sediments site. One additional comment was received from a private citizen but was intended for the Paden City Groundwater docket. The 13 comments received, from 11 private citizens and two non-profit organizations, expressed support for listing the site on the NPL. One commenter, a non-profit organization, requested that community engagement opportunities be available if the site is placed on the NPL. Another non-profit organization supported listing but included requests for further actions in its comment submission. The non-profit organization also submitted comments expressing environmental justice concerns. The non-profit organization made the following assertions regarding the contamination at the site:

- Data from a 2016 report suggested that an ecological risk exists in Bear Creek, warranting remediation.
- A decrease in total polycyclic aromatic hydrocarbons (PAH) concentrations with increasing distance from Sparrows Creek suggested that Sparrows Point influences PAH concentrations in that area.
- Bear Creek contains elevated metals concentrations including chromium, zinc, copper, and cadmium.
- Groundwater to surface water migration should be considered as a migration route for hazardous substances to Bear Creek due to the possible migration of contamination that appeared to occur via this route.
- Offshore concentrations of dissolved constituents suggested that groundwater fluxes were migrating from onshore source areas.
- The background levels should be withdrawn because locations upstream of Sparrows Point were not representative of background.
- The three background sediment sample locations used in the HRS evaluation were not representative of background contamination, in part, due to the tidal influence impacting Bear Creek and the lack of identification of possible upstream contributors to the contamination.

Following listing, the EPA will fully investigate the extent of contamination at the site. A subsequent stage of the Superfund process, the remedial investigation (RI), characterizes conditions and hazards at the site more comprehensively. The EPA noted in the HRS documentation record at proposal on the cover sheet that ''[t]he NPL listing focuses solely on the releases to the Surface Water Migration Pathway into Bear Creek via Tin Mill Canal.'' This same page of the HRS documentation record at proposal explains the rationale for why the ground migration pathway was not scored, indicating that it is not a pathway of concern because ground water was not used as drinking water within four miles of the site source (*i.e.,* the Tin Mill Canal).

The background levels and background sample locations presented in the HRS documentation record at proposal were appropriate for HRS scoring purposes. For HRS scoring, background samples are used to establish whether a release of contamination has occurred. The background sample locations are only used as a reference point to establish that a significant increase in contaminant levels in the downstream samples has occurred. Ideally, background samples are collected from an area outside of the influence of the contamination being evaluated, but with similar physical conditions. Accordingly, the area outside of the influence of the contamination used to represent background levels for HRS evaluation purposes may not necessarily coincide with natural background levels. For this site, samples from background locations upgradient of the contaminated samples ''were used to establish background conditions and chemical compositions of the sediment materials upstream of the discharge point of [Tin Mill Canal].'' Hence, the background level determination was consistent with the HRS and the site as preliminary defined for HRS scoring purposes (*i.e.,* releases to Bear Creek from the Tin Mill Canal).

Many sites on the NPL are located in environmental justice, minority and/or low-income communities. Through the cleanup of these sites, the Superfund program has sought to ensure that residents do not bear a disproportionate share of the negative environmental consequences resulting from past industrial, governmental, and commercial operations, and that they have meaningful involvement in the decisions on how to clean up the site. Furthermore, as the site moves through the Superfund process, EPA will develop a community relations plan to ensure public involvement and participation in the cleanup.

C. Clarification of Figure for Meeker Avenue Plume Site

The EPA is providing a clarification to Figure 8 in the HRS Documentation Record for the Meeker Avenue Plume site. This figure provides the location of possible originating facilities of subsurface contamination. Figure 8 has been modified to include the Empire State Varnish Company located at 38

Varick Street. The Empire State Varnish Company was identified as a possible originating facility in the supporting reference materials that provide the basis for Figure 8, but it was inadvertently omitted from that figure at proposal. EPA also notes that the facility was sufficiently identified as within the area of subsurface contamination as described in Figure 8 in the HRS documentation record at proposal. EPA is providing this clarification here to reflect that the facility is a possible originating facility of subsurface contamination at the Meeker Avenue Plume site.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule does not contain any information collection requirements that require approval of the OMB.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This rule listing sites on the NPL does not impose any obligations on any group, including small entities. This rule also does not establish standards or requirements that any small entity must meet and imposes no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Listing a site on the NPL does not itself impose any costs. Listing does not mean that the EPA necessarily will undertake remedial action. Nor does listing require any action by a private party, state, local or tribal governments or determine liability for response costs. Costs that arise out of site responses result from future site-specific decisions regarding what actions to take, not directly from the act of placing a site on the NPL.

F. Executive Order 13132: Federalism

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. Listing a site on the NPL does not impose any costs on a tribe or require a tribe to take remedial action. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because this action itself is procedural in nature (adds sites to a list) and does not, in and of itself, provide protection from environmental health and safety risks. Separate future regulatory actions are required for mitigation of environmental health and safety risks.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment. As discussed in Section I.C. of the preamble to this action, the NPL is a list of national priorities. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is of only limited significance as it does not assign liability to any party. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

L. Congressional Review Act

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Provisions of the Congressional Review Act (CRA) or section 305 of CERCLA may alter the effective date of this regulation. Under 5 U.S.C. 801(b)(1), a rule shall not take effect, or continue in effect, if Congress enacts (and the President signs) a joint resolution of disapproval, described under section 802. Another statutory provision that may affect this rule is CERCLA section 305, which provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha,* 462 U.S. 919,103 S. Ct. 2764 (1983), and *Bd. of Regents of the University of Washington* v. *EPA,* 86 F.3d 1214,1222 (D.C. Cir. 1996), cast the validity of the legislative veto into question, the EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives.

If action by Congress under either the CRA or CERCLA section 305 calls the effective date of this regulation into

question, the EPA will publish a document of clarification in the **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Barry N. Breen,

Acting Assistant Administrator, Office of Land and Emergency Management.

For the reasons set out in the preamble, title 40, chapter I, part 300, of the Code of Federal Regulations is amended as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.;* 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 2. Amend appendix B of part 300 by:

■ a. In Table 1, adding entries for ''GA,'' ''Westside Lead'', ''IN,'' ''North 5th Street Groundwater Contamination'', ''MA,'' ''Lower Neponset River'', ''MD,'' ''Bear Creek Sediments'', ''MI,'' ''Michner Plating—Mechanic Street'', ''MN,'' ''Southeast Hennepin Area Groundwater and Vapor'', ''NY,'' ''Meeker Avenue Plume'', ''SC,'' ''Galey and Lord Plant'', ''TN,'' ''National Fireworks'', ''WI,'' ''Unity Auto Mart'', and ''WV,'' ''Paden City Groundwater'' in alphabetical order by state; and

■ b. In Table 2, adding the entry for ''OR,'' ''Bradford Island'' in alphabetical order by state.

The additions read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [a]
*	* * * *	* *	*
GA	Westside Lead	Atlanta.	
*	* * * *	* *	*
IN	North 5th Street Groundwater Contamination	Goshen.	
*	* * * *	* *	*
MA	Lower Neponset River	Boston/Milton.	
*	* * * *	* *	*
MD	Bear Creek Sediments	Baltimore County.	
*	* * * *	* *	*
MI	Michner Plating—Mechanic Street	Jackson.	
*	* * * *	* *	*
MN	Southeast Hennepin Area Groundwater and Vapor	Minneapolis.	
*	* * * *	* *	*
NY	Meeker Avenue Plume	Brooklyn.	
*	* * * *	* *	*
SC	Galey and Lord Plant	Society Hill.	
*	* * * *	* *	*
TN	National Fireworks	Cordova.	
*	* * * *	* *	*
WI	Unity Auto Mart	Unity.	
*	* * * *	* *	*
WV	Paden City Groundwater	Paden City.	
*	* * * *	* *	*

[a] A = Based on issuance of health advisory by Agency for Toxic Substances and Disease Registry (if scored, HRS score need not be greater than or equal to 28.50).

* * * * *

TABLE 2—FEDERAL FACILITIES SECTION

State	Site name	City/county	Notes [a]
*	* * * *	* *	*
OR	Bradford Island	Cascade Locks.	

TABLE 2—FEDERAL FACILITIES SECTION—Continued

State	Site name	City/county	Notes [a]
*	* * * * * *	*	*
*	* * * * * *	*	*

[a] A = Based on issuance of health advisory by Agency for Toxic Substances and Disease Registry (if scored, HRS score need not be greater than or equal to 28.50).

* * * * *

[FR Doc. 2022–05397 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 87, No. 51
Wednesday, March 16, 2022

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2021–0904]

RIN 1625–AA08

Special Local Regulation; 2022 Horsepower on the Hudson, Hudson River, Castleton, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish temporary special local regulations on certain waters of the Hudson River in the vicinity of Castleton-on-the-Hudson, New York, in support of the Horsepower on the Hudson event on August 8, 2022. This action is necessary to ensure the safety of participants, participant vessels, spectators, and mariners transiting the area from the dangers associated with vessels operating at high-speeds during the Horsepower on the Hudson event. This proposed rulemaking would allow the Coast Guard to enforce vessel movements within three regulated areas and temporarily restrict vessel traffic in a portion of the Hudson River between Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910). We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before April 15, 2022.

ADDRESSES: You may submit comments identified by docket number USCG–2021–0904 using the Federal Decision Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document call or email MST2 T. Whitley, Waterways Management Division, U.S. Coast Guard; telephone 718–354–4356, email *D01-SMB-SecNY-Waterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port New York
DHS Department of Homeland Security
FR Federal Register
LLNR Light List Number
NPRM Notice of proposed rulemaking
OMB Office of Management and Budget
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

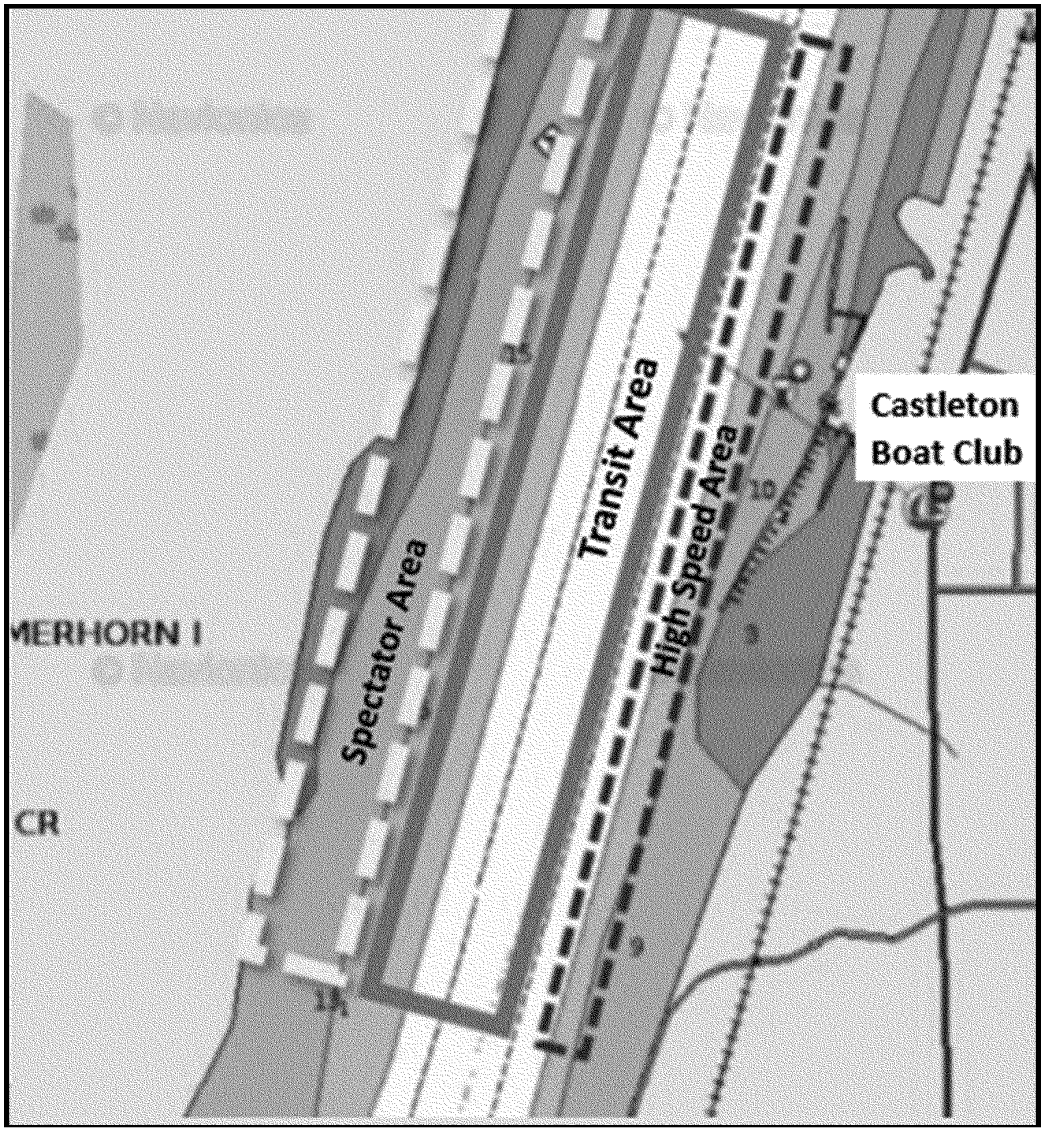
On October 10, 2021, the Coast Guard received an Application for Marine Event from the Castleton Boat Club for the Horsepower on the Hudson event. The event will take place on the Hudson River vicinity of Castleton-on-the-Hudson, on August 8, 2022. The Captain of the Port New York (COTP) has determined that this event in close proximity to marine traffic poses a significant risk to public safety and property. The event will consist of approximately 36 participating vessels that will transit by the Castleton Boat Club at speeds exceeding 100 mph. The participating vessels are expected to maneuver at high speed along the eastern shore of the Hudson River from Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910) outside of the navigable channel. The event is also expected to have approximately 20 spectator crafts on the opposite side of the river from Hudson River Lighted Buoy 201 (LLNR 38903) to Hudson River Lighted Buoy 205 (LLNR 38915) outside of the navigable channel.

The combination of the vessels operating at high speeds during the event and anticipated number of spectator crafts has the potential to result in serious injuries or fatalities. In order to protect the safety of all waterway users including event participants and spectators, this proposed rule would establish three regulated areas and temporarily restrict vessel traffic for the duration of the event.The purpose of this proposed rulemaking is to ensure the safety of participants, non-participants, and transiting vessels on the navigable waters in the vicinity of the high speed race route and the spectator zone before, during, and after the scheduled event. The Coast Guard proposes this rulemaking under the authority of 46 U.S.C. 70041.

III. Discussion of Proposed Rule

The Coast Guard proposes to establish a temporary special local regulation in the vicinity of Castleton-on-the-Hudson, NY, encompassing all navigable waters of the Hudson River from Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910) from 10 a.m. to 4 p.m. on August 8, 2022. The high speed demonstration will consist of approximately 36 vessels that will transit by the Castleton Boat Club at speeds exceeding 100 mph. The special local regulation will include the following areas: (1) A *high speed area,* all navigable waters of the Hudson River from Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910) east of the navigable channel shoreward where all persons and vessels, except those persons and vessels participating in the high speed boat demonstration event, are prohibited from entering, transiting through, or remaining within. Additionally, no participant may transit at high speed inside this zone when vessels are transiting through the transit area; (2) A *transit area,* all navigable waters of the main navigation channel of the Hudson River from Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910); and (3) A *spectator area,* all navigable waters of the Hudson River from Hudson River Lighted Buoy 201 (LLNR 38903) to Hudson River Lighted Buoy 205 (LLNR 38915) west of the navigable channel shoreward.

BILLING CODE 9110–04–P



Chartlet showing the three designated areas within the special local regulation.

BILLING CODE 9110–04–C

The duration of the areas are intended to ensure the safety of vessels, participants, spectators, and those transiting the area during the Horsepower on the Hudson event. Navigation rules shall apply at all times within the areas. The Coast Guard will provide notice of the special local regulation by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize out analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This proposed rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this proposed rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration of the temporary special local regulation. With this special local regulation, the Coast Guard intends to allow marine traffic to transit via the main navigable channel. The special local regulation is limited in duration and to a narrowly tailored geographic area with designated and adequate space for transiting vessels to pass via the main navigation channel when permitted by the COTP or designated representative. In addition, although this rule restricts access to the waters encompassed by the local regulation, the effect of this rule will not be significant because the local waterway users will be notified in advance via public Broadcast Notice to Mariners to ensure the special local regulation will result in minimum impact as the main navigation channel will be maintained allowing vessels to transit Hudson River outside of the high speed area or the spectator area. Mariners will therefore be able to plan ahead and either transit through the available transit area or outside the periods of enforcement of the special local regulation. Additionally, mariners may be able to transit the high speed area or spectator areas with approval from the COTP or

designated representative. The entities most likely affected are commercial vessels and pleasure craft engaged in recreational activities.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the regulated area may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator. While the special local regulation is in effect, vessel traffic can pass safely using the main ship channel of the Hudson River. The maritime public will be advised in advance of this special local regulation via Broadcast Notice to Mariners.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a regulated area lasting 5 hours that would limit persons or vessels from transiting certain regulated areas during the scheduled event. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2021–0904 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of

the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.T01–0904 to read as follows:

§ 100.T01–0904 Special Local Regulation; 2022 Horsepower on the Hudson, Hudson River, Castleton, NY.

(a) *Regulated areas.* The regulations in this section apply to the following regulated areas: (1) *High speed area.* All navigable waters of the Hudson River from Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910) east of the navigable channel shoreward.

(2) *Transit area.* All navigable waters of the main navigation channel of the Hudson River from Hudson River Lighted Buoy 202 (LLNR 38905) to Hudson River Light 204 (LLNR 38910).

(3) *Spectator area.* All navigable waters of the Hudson River from Hudson River Lighted Buoy 201 (LLNR 38903) to Hudson River Lighted Buoy 205 (LLNR 38915) west of the navigable channel shoreward.

(b) *Definitions.* As used in this section—

Designated Representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port New York (COTP) in the enforcement of the safety zone.

Participant means all persons and vessels registered with the event sponsor as a participants in the race.

Spectator means any vessel in the vicinity of the event with the primary purpose of witnessing the event. Spectator vessels can observe the marine event from the designated spectator area.

(c) *Regulations.* (1) All non-participant persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated areas described in paragraph (a) of this section unless authorized by the COTP or their designated representative.

(2) To seek permission to enter, contact the COTP or the designated representative via VHF–FM Marine Channel 16 or by contacting the Coast Guard Sector New York command center at (718) 354–4356 or on VHF 16 to obtain permission. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(d) *Enforcement period.* This section will be enforced from 10 a.m. through 4 p.m. on August 6, 2022.

(e) *Information broadcasts.* The COTP or the designated representative will inform the public through Broadcast Notice to Mariners of any changes in the planned schedule.

Dated: March 10, 2022.

Z. Merchant,

Captain, U.S. Coast Guard, Captain of the Port New York.

[FR Doc. 2022–05545 Filed 3–15–22; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2022–0187; FRL–9606–01–R4]

Air Plan Approval; GA; Updates to References to Appendix W Modeling Guidelines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Georgia, through the Georgia Environmental Protection Division (GA EPD) on September 1, 2020. Specifically, EPA is proposing to approve updates to the incorporation by reference of federal prevention of significant deterioration (PSD) new source review (NSR) regulations in the Georgia SIP. Based on the proposal to approve this SIP revision, EPA is also proposing to convert the previous conditional approval regarding Georgia's infrastructure SIP's PSD elements for the 2015 Ozone National Ambient Air Quality Standard (NAAQS) to a full approval. EPA is proposing to approve these changes pursuant to the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before April 15, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2022–0187 at *www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Josue Ortiz Borrero, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8085. Mr. Ortiz Borrero can also be reached via electronic mail at *ortizborrero.josue@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 1, 2015, EPA promulgated a revised primary and secondary NAAQS for ozone, revising the 8-hour ozone standards from 0.075 parts per million (ppm) to a new more protective level of 0.070 ppm. *See* 80 FR 65292 (October 26, 2015). Pursuant to section 110(a)(1) of the CAA, states are required to submit SIP revisions meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP

elements such as requirements for monitoring, basic program requirements, and legal authority that are designed to assure attainment and maintenance of the NAAQS. This particular type of SIP is commonly referred to as an ''infrastructure SIP'' or ''iSIP.'' States were required to submit such SIP revisions for the 2015 8-hour ozone NAAQS to EPA no later than October 1, 2018.[1]

On September 24, 2018, Georgia met its requirement to submit an iSIP for the 2015 8-hour ozone NAAQS by the October 1, 2018, deadline. EPA subsequently approved most of the infrastructure SIP elements for the 2015 Ozone NAAQS for the State.[2] [3] However, regarding the PSD elements of section 110(a)(2)(C), (D)(i)(II) (prong 3), and (J) (hereinafter referred to as element C, Prong 3, and element J, respectively), EPA conditionally approved [4] these portions of Georgia's iSIP submission because of outdated references to the federal guideline on air quality modeling found in Appendix W of 40 CFR part 51.[5]

For elements C and J to be approved for PSD, a state needs to demonstrate that its SIP meets the PSD-related infrastructure requirements of these sections. These requirements are met if the state's implementation plan includes a PSD program that meets current federal requirements. Element D(i)(II) (prong 3) is also approvable when a state's implementation plan contains a fully approved PSD program. EPA's PSD regulations at 40 CFR 51.166(l) require that modeling be conducted in accordance with Appendix W, *Guideline on Air Quality Models.* EPA promulgated the most current version of Appendix W on January 17, 2017. *See* 82 FR 5182. Therefore, in order to approve the iSIP PSD elements for the 2015 8-hour ozone NAAQS, PSD regulations in SIPs are required to reference the most current version of Appendix W.

As discussed in the conditional approval for the 2015 ozone iSIP PSD elements, Georgia's SIP contained outdated references to Appendix W, and the State committed to update the outdated references and submit a SIP revision within one year of EPA's final rule conditionally approving these PSD elements. Accordingly, Georgia was required to make its submission by April 15, 2021. Georgia met this commitment by submitting a SIP revision to correct the deficiencies on or before the applicable deadline. Through this Notice of Proposed Rulemaking (NPRM), EPA is proposing to approve revisions to the SIP-approved PSD rule and is proposing to convert the conditional approval to full approval for Georgia, regarding element C, Prong 3, and element J, for the 2015 8-hour ozone NAAQS infrastructure SIP.

II. What is EPA's approach to the review of infrastructure SIP submissions?

As discussed above, whenever EPA promulgates a new or revised NAAQS, CAA section 110(a)(1) requires states to submit infrastructure SIPs that meet the various requirements of CAA section 110(a)(2), as applicable. Due to ambiguity in some of the language of CAA section 110(a)(2), EPA believes that it is appropriate to interpret these provisions in the specific context of acting on infrastructure SIP submissions. EPA has previously provided comprehensive guidance on the application of these provisions through a guidance document for infrastructure SIP submissions and through regional actions on infrastructure submissions.[6] Unless otherwise noted below, EPA is following that existing approach in acting on these submissions. In addition, in the context of acting on such infrastructure submissions, EPA evaluates the submitting state's implementation plan for facial compliance with statutory and regulatory requirements, not for the state's implementation of its SIP.[7] EPA has other authority to address any issues concerning a state's implementation of the rules, regulations, consent orders, etc. that comprise its SIP.

III. EPA's Analysis of the September 1, 2020, Submittal

On September 1, 2020, Georgia submitted a SIP revision to address its outdated reference to 40 CFR part 51, Appendix W, and to meet the PSD Infrastructure SIP requirements for the 2015 8-hour ozone NAAQS.[8] The SIP revision includes changes to the SIP-approved PSD rule to update the incorporation by reference date for 40 CFR 52.21, including the reference to Appendix W in 40 CFR 52.21(l), and a request to convert the April 15, 2020, conditional approval of the PSD requirements of element C, Prong 3, and element J, of Georgia's 2015 8-hour ozone NAAQS infrastructure SIP to a full approval.

Specifically, the September 1, 2020, SIP revision makes changes to Georgia's Rule 391–3–1–.02(7), *Prevention of Significant Deterioration of Air Quality*. Paragraph (7) previously incorporated federal PSD regulations at 40 CFR 52.21 as promulgated through October 18, 2016. However, the September 1, 2020, SIP revision updates this incorporation by reference date to January 17, 2017. Additionally, Georgia made minor corrections in paragraph (7) by deleting commas after the CFR in citations to Federal rules and adding the word ''Part'' to a citation to 40 CFR part 52.21(aa)(12)(i)(b) in (7)(b)(21)(xi) for consistency with other citations to 52.21.

As explained in the April 15, 2020, conditional approval notice, Georgia committed to update its PSD regulations to reference the most current version of Appendix W. EPA promulgated the most current version of Appendix W on January 17, 2017. *See* 82 FR 5182. Paragraph 391–3–1–.02(7)(b)9 specifically incorporates the modeling provisions of 40 CFR 52.21(l), which in turn requires that modeling be conducted in accordance with the Guideline on Air Quality Models in Appendix W of 40 CFR part 51. By updating the incorporation by reference date of the 40 CFR 52.21 provisions

[1] In infrastructure SIP submissions, states generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a combination of state regulations and statutes, some of which have been incorporated into the SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2).

[2] For the State of Georgia, EPA approved most elements, except for the Prong 1 and Prong 2 interstate transport provisions, and the PSD provisions (elements C, Prong 3, and J), on March 11, 2020. *See* 85 FR 14147.

[3] The Prong 1 and Prong 2 interstate transport provisions for Georgia, were approved on 12/2/2021. *See* 86 FR 68413.

[4] Under CAA section 110(k)(4), EPA may conditionally approve a SIP revision based on a commitment from a state to adopt specific enforceable measures by a date certain, but not later than one year from the date of approval. If the state fails to meet the commitment within one year of the final conditional approval, the conditional approval will be treated as a disapproval and EPA will issue a finding of disapproval.

[5] EPA conditionally approved the PSD provisions of element C, Prong 3, and element J on April 15, 2020. *See* 85 FR 20836. The notice of proposed rulemaking associated with the conditional approval provides additional information regarding the CAA's PSD iSIP provisions. *See* 85 FR 7695 (February 11, 2020).

[6] EPA explains and elaborates on these ambiguities and its approach to address them in its September 13, 2013 Infrastructure SIP Guidance (available at *https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf*), as well as in numerous agency actions, including EPA's prior action on Georgia infrastructure SIPs to address the 2010 Nitrogen Dioxide NAAQS. *See* 81 FR 41905 (June 28, 2016).

[7] *See Mont. Envtl. Info. Ctr.* v. *Thomas,* 902 F.3d 971 (9th Cir. 2018).

[8] The September 1, 2020, submittal contains changes to other SIP-approved rules that are not addressed in this notice. EPA will be acting on those rules separately.

referenced in Paragraph 391–3–1–.02(7) in the State's PSD regulations to January 17, 2017, Georgia's PSD regulations include the requirement to use the most recent version of Appendix W when carrying out air quality modeling for PSD purposes. Thus, EPA is proposing to find that Georgia satisfied the requirements of the PSD elements for the 2015 8-hour ozone infrastructure SIP and met the commitment associated with the conditional approval. For the reasons stated above, EPA is proposing to incorporate the changes into the Georgia SIP and convert the April 15, 2020, conditional approval of element C, Prong 3, and element J, of Georgia's 2015 8-hour ozone NAAQS infrastructure SIP to a full approval.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Georgia Rule 391–3–1–.02(7), titled ''Prevention of Significant Deterioration of Air Quality,'' state effective July 29, 2020.[9] EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Proposed Action

EPA is proposing to approve the aforementioned changes to the Georgia Rule 391–3–1–02(7), *Prevention of Significant Deterioration of Air Quality,* and convert the conditional approval for element C, Prong 3, and element J, for the 2015 8-hour ozone Infrastructure SIPs to a full approval.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided they meet the criteria of the CAA. This action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 9, 2022.

Daniel Blackman,

Regional Administrator, Region 4.

[FR Doc. 2022–05396 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

[9] This incorporation by reference excludes the automatic recission clause at 391–3–1–.02(7)(a)(2)(iv), and portions of Rule 391–3–1–.02(7) incorporating by reference 40 CFR 52.21(b)(2)(v), and 40 CFR 52.21(b)(3)(iii)(c). *See* 40 CFR 52.570(c).

Notices

Federal Register
Vol. 87, No. 51
Wednesday, March 16, 2022

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Arizona Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the Arizona Advisory Committee (Committee) to the Commission will hold a meeting via Webex on Friday, March 25, 2022, from 11:00 a.m. to 12:00 p.m. Mountain Standard Time, for the purpose of discussing potential civil rights topics to study.

DATES: The meeting will be held on:

- Friday, March 25, 2022, from 11:00 a.m.–12:00 p.m. MST.

Access Information: Friday, March 25th at 11:00 a.m. MST—Register at: *https://tinyurl.com/5n8yabhh.*

FOR FURTHER INFORMATION CONTACT: Kayla Fajota, Designated Federal Officer, (DFO) at *kfajota@usccr.gov* or by phone at (434) 515–2395.

SUPPLEMENTARY INFORMATION: Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012 or email Kayla Fajota (DFO) at *kfajota@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing prior to and after the meetings at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzl2AAA.*

Please click on the ''Committee Meetings'' tab. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome and Roll Call
II. Approval of Minutes
III. Discussion of Topic Choice
IV. Public Comment
V. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102 –3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the immediacy of the subject matter.

Dated: March 11, 2022.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2022–05549 Filed 3–15–22; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Virginia Advisory Committee; Correction

AGENCY: Commission on Civil Rights.

ACTION: Notice; revision to meeting access code.

SUMMARY: The Commission on Civil Rights published a notice in the **Federal Register** on Friday, March 4, 2022, concerning a briefing of the Virginia Advisory Committee. The document contained the incorrect meeting access code.

FOR FURTHER INFORMATION CONTACT: Sarah Villanueva, 202–499–0263, *svillanueva@usccr.gov.*

Correction

In the **Federal Register** on Monday, Friday, March 4, 2022, in FR Document Number 2022–04628, second column on page 12425, correct the meeting access code to: 2760 681 1173.

Dated: March 9, 2022.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2022–05386 Filed 3–15–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Procedures for Submitting Requests for Objections From the Section 232 National Security Adjustments of Imports of Steel and Aluminum

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on November 22, 2021, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Department of Commerce.

Title: Procedures for Submitting Requests for Objections from the Section 232 National Security Adjustments of Imports of Steel and Aluminum.

OMB Control Number: 0694–0138.

Form Number(s): None.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 28,061.

Average Hours Per Response: 4 hours.

Burden Hours: 112,244.

Needs and Uses: On March 8, 2018, the President issued Proclamations 9704 and 9705 concurring with the findings of the two reports and determining that adjusting imports through the

imposition of duties on steel and aluminum is necessary so that imports of steel and aluminum will no longer threaten to impair the national security. The Proclamations also authorized the Secretary of Commerce, in consultation with the Secretary of Defense, the Secretary of the Treasury, the Secretary of State, the United States Trade Representative, the Assistant to the President for Economic Policy, the Assistant to the President for National Security Affairs, and other senior executive branch officials as appropriate, to grant exclusions from the duties for domestic parties affected by the duties. This could take place if the Secretary determines the steel or aluminum for which the exclusion is requested is not produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality or should be excluded based upon specific national security considerations. The President directed the Secretary to promulgate regulations as may be necessary to implement an exclusion process. The purpose of this information collection is to allow for submission of exclusions requests from the remedies instituted in presidential proclamations adjusting imports of steel into the United States and adjusting imports of aluminum into the United States.

Affected Public: Business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

Legal Authority: Section 232 of the Trade Expansion Act of 1962, Presidential Proclamations 9704 and 9705.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0138.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2022–05511 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–503, A–122–503, A–570–502]

Certain Iron Construction Castings From Brazil, Canada and the People's Republic of China: Final Results of Expedited Fifth Sunset Review of Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of these sunset reviews, the Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) orders would be likely to lead to continuation or recurrence of dumping at the dumping margins identified in the ''Final Results of Reviews'' section of this notice.

DATES: Applicable March 16, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, Washington, DC, 20230; telephone: (202) 482–4161.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2021, Commerce published the notice of initiation of the fifth sunset review of the AD orders on certain iron construction castings from Brazil, Canada, and the People's Republic of China (China) [1] pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2]

On December 16, 2021, D&L Foundry, Inc.; EJ USA, Inc.; Neenah Foundry Company; and U.S. Foundry & Manufacturing Corporation (collectively, ''domestic interested parties'') notified Commerce of their intent to participate within the 15-day period specified in 19 CFR 351.218(d)(1). The domestic interested parties claimed interested party status under section 771(9)(C) of the Act as producers of a domestic like product in the United States.

On December 20, 2021, Commerce received complete substantive responses to the *Notice of Initiation* with respect to the *Orders,* from the domestic interested parties within the 30-day period specified in 19 CFR 351.218(d)(3)(i).[3] Commerce received no substantive responses from respondent interested parties. As a result, pursuant to section 751(c)(3)(8) of the Act and 19 CFR 351.218(e)(l)(ii)(C)(2), Commerce has conducted expedited (120-day) sunset reviews of the AD orders on certain iron construction castings from Brazil, Canada, and China.

Scope of the Orders

The scope of the *Orders* is certain iron construction castings from Brazil, Canada, and China. For a complete description of the scope of the *Orders, see* the appendix to this notice.

Analysis of Comments Received

A complete discussion of all issues raised in these sunset reviews is provided in the accompanying Issues and Decision Memorandum.[4] The issues discussed in the Issues and Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins of dumping likely to prevail if the *Orders* were revoked. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of the Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the AD orders on certain iron construction castings from Brazil, Canada, and China

[1] *See Antidumping Duty Order: Iron Construction Castings from Brazil,* 51 FR 17220 (May 9, 1986); *see also Antidumping Duty Order: Certain Iron Construction Castings from Canada,* 51 FR 7600 (March 5, 1986), amended by *Iron Construction Castings from Canada; Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order,* 51 FR 34110 (September 25, 1986); and *Antidumping Duty Order: Iron Construction Castings from the People's Republic of China,* 51 FR 17222 (May 9, 1986) (collectively *Orders*).

[2] *See Initiation of Five Year (Sunset) Reviews,* 86 FR 68220 (December 1, 2021).

[3] *See* Domestic Interested Parties' Letter, ''Five Year ('Sunset') Review of the Antidumping Duty Order on Iron Construction Castings from the People's Republic of China—Domestic Interested Parties' Substantive Response''; ''Five Year ('Sunset') Review of the Antidumping Duty Order on Iron Construction Castings from Brazil—Domestic Interested Parties' Substantive Response,''; and ''Five Year ('Sunset') Review of the Antidumping Duty Order on Iron Construction Castings from Canada—Domestic Interested Parties' Substantive Response,'' each dated December 31, 2022.

[4] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of Expedited Fourth Sunset Reviews of the Antidumping Duty Orders on Certain Iron Construction Castings from Brazil, Canada, and the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice.

would likely to lead to a continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail would be weighted-average margins up to 58.74 percent for Brazil, up to 25.52 percent for China, and above *de minimis* for Canada.

Notification Regarding Administrative Protective Orders

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing the results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: March 10, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Orders

Brazil

The merchandise covered by the order consists of certain iron construction castings from Brazil, limited to manhole covers, rings, and frames, catch basin grates and frames, cleanout covers and frames used for drainage or access purposes for public utility, water and sanitary systems, classifiable as heavy castings under Harmonized Tariff Schedule (HTS) item numbers 7325.10.0010 7325.10.0020, 7325.10.0025; and to valve, service, and meter boxes which are placed below ground to encase water, gas, or other valves, or water and gas meters, classifiable as light castings under HTS item numbers 7325.10.0030, 7325.10.0035, 7325.99.1000. The HTS item numbers are provided for convenience and Customs purposes only. The written description remains dispositive.

Canada

The merchandise covered by the order consists of certain iron construction castings from Canada, limited to manhole covers, rings, and frames, catch basin grates and frames, clean-out covers, and frames used for drainage or access purposes for public utility, water and sanitary systems, classifiable as heavy castings under HTS item numbers 7325.10.0010, 7325.10.0020, 7325.10.0025, 7325.99.1000. The HTS item numbers are provided for convenience and customs purposes only. The written description remains dispositive.

China

The products covered by this order are certain iron construction castings, limited to manhole covers, rings and frames, catch basin grates and frames, cleanout covers and drains used for drainage or access purposes for public utilities, water and sanitary systems; and valve, service, and meter boxes which are placed below ground to encase water, gas, or other valves, or water or gas meters. These articles must be of cast iron, not alloyed, and not malleable. This merchandise is currently classifiable under the HTS item number 7325.10.0010 and 7325.10.0050. The HTS item numbers are provided for convenience and Customs purposes. The written product description remains dispositive.

[FR Doc. 2022–05550 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB838]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Surfclam and Ocean Quahog Advisory Panel will hold a public webinar meeting. See **SUPPLEMENTARY INFORMATION** for agenda details.

DATES: The meeting will be held on Tuesday, April 19, 2022, from 1:30 p.m. until 4 p.m.

ADDRESSES: The meeting will be held via webinar. Connection information will be posted to the calendar prior to the meeting at *www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is for the Advisory Panel to develop a fishery performance report (FPR) for Atlantic surfclam and ocean quahog. The intent of the FPR is to facilitate a venue for structured input from the Advisory Panel for the specifications processes. The FPR will be used by the MAFMC's Scientific and Statistical Committee and Council when reviewing specifications for the 2023 fishing year.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 11, 2022.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2022–05519 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB876]

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Joint Ecosystem-Based Fishery Management Committee and Plan Development Team (PDT) consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Tuesday, April 5, 2022, at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/8694620615028955918.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Committee and Plan Development Team will receive an update by the Council's facilitator, Tom Balf of OceanVest, on initial outreach progress for public information workshops. They will also finalize and

approve recommendations for a prototype Management Strategy Evaluation (MSE) process to be presented at the April Council meeting. A planning document for the process will include a purpose and objectives for conducting a prototype MSE as well as recommendations about how it will be conducted. It will also include recommendations for stakeholder participants. The Committee and PDT will finalize recommendations for 2022–26 EBFM research priorities. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 11, 2022.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2022–05523 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Interagency Marine Debris Coordinating Committee Meeting

AGENCY: National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of open meeting.

SUMMARY: Notice is hereby given of a virtual public meeting of the Interagency Marine Debris Coordinating Committee (IMDCC). IMDCC members will discuss federal marine debris activities, with a particular emphasis on the topics identified in the section on *Matters to Be Considered.*

DATES: The virtual public meeting will be held on March 29, 2022 from 10 a.m. to 11 a.m. ET.

ADDRESSES: The meeting will be held virtually using Adobe Connect. You can connect to the meeting using the website or phone number provided:

Meeting link: https://noaaorr.adobeconnect.com/imdcc/.

Phone: +1 866–399–2601; PIN: 8663992601.

Attendance will be limited to 100 individuals. Refer to the Interagency Marine Debris Coordinating Committee website at *https://marinedebris.noaa.gov/IMDCC* for the most up-to-date information on how to participate and on the agenda.

FOR FURTHER INFORMATION CONTACT: Ya'el Seid-Green, Executive Secretariat, Interagency Marine Debris Coordinating Committee, Marine Debris Program; Phone 240–533–0399; Email *yael.seid-green@noaa.gov* or visit the Interagency Marine Debris Coordinating Committee website at *https://marinedebris.noaa.gov/IMDCC.*

SUPPLEMENTARY INFORMATION:

The Interagency Marine Debris Coordinating Committee (IMDCC) is a multi-agency body responsible for coordinating a comprehensive program of marine debris research and activities among Federal agencies, in cooperation and coordination with non-governmental organizations, industry, academia, States, Tribes, and other nations, as appropriate. Representatives meet to share information, assess and promote best management practices, and coordinate the Federal Government's efforts to address marine debris.

The Marine Debris Act establishes the IMDCC (33 U.S.C. 1954). The IMDCC submits biennial progress reports to Congress with updates on activities, achievements, strategies, and recommendations. The National Oceanic and Atmospheric Administration serves as the Chairperson of the IMDCC.

The meeting will be open to public attendance on March 29, 2022, from 10 a.m. to 11 a.m. ET. There will not be a public comment period. The meeting will not be recorded.

Matters To Be Considered

The open meeting will include a presentation from the Department of State on international plastic pollution negotiations. The agenda topics described are subject to change. The latest version of the agenda will be posted at *https://marinedebris.noaa.gov/IMDCC.*

Special Accommodations

The meeting is accessible to people with disabilities. Closed captioning will be available. Requests for other auxiliary aids should be directed to Ya'el Seid-Green, Executive Secretariat at *yael.seid-green@noaa.gov* or 240–533–0399 by March 21, 2022.

Scott Lundgren,

Director, Office of Response and Restoration, National Ocean Service.

[FR Doc. 2022–05551 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB758]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ocean Wind Marine Site Characterization Surveys, New Jersey

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from Ocean Wind, LLC (Ocean Wind) for authorization to take marine mammals incidental to marine site characterization surveys in the area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Area OCS–A 0532 and potential export cable routes to landfall locations in New Jersey. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than April 15, 2022.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to *ITP.Daly@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which NMFS have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

NMFS will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On October 1, 2021, NMFS received a request from Ocean Wind for an IHA to take marine mammals incidental to marine site characterization surveys off of New Jersey in the area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Area OCS–A 0532 (Lease Area) and potential export cable routes (ECRs) to landfall locations in New Jersey. Following NMFS review of the draft application, a revised version was submitted on November 24, 2021 and again on January 24, 2022. The January 2022 revised version was deemed adequate and complete on February 8, 2022. Ocean Wind's request is for take of 16 species of marine mammals, by Level B harassment only. Neither Ocean Wind nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued an IHA to Ocean Wind for similar work in the same geographic area on June 8, 2017 (82 FR 31562; July 7, 2017) with effective dates from June 8, 2017, through June 7, 2018 and on May 10, 2021 (86 FR 26465, May 14, 2021) with effective dates from May 10, 2021 through May 9, 2022. Ocean Wind complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the 2017–2018 IHA. Because the current IHA is still effective, we have not yet received the associated monitoring report from Ocean Wind. The proposed IHA would be effective May 10, 2022 through May 9, 2023.

Description of Proposed Activity

Overview

As part of its overall marine site characterization survey operations, Ocean Wind proposes to conduct high-resolution geophysical (HRG) surveys in the Lease Area and along potential ECRs to landfall locations in New Jersey.

The purpose of the marine site characterization surveys are to obtain an assessment of seabed (geophysical, geotechnical, and geohazard), ecological, and archeological conditions within the footprint of a planned offshore wind facility development area. Surveys are also conducted to support engineering design and to map unexploded ordnance. Underwater sound resulting from Ocean Wind's proposed site characterization survey activities, specifically HRG surveys, has the potential to result in incidental take of marine mammals in the form of Level B behavioral harassment.

Dates and Duration

Site characterization surveys considered under this application are expected to occur between May 10, 2022 and May 9, 2023 with a total of 275 survey days. A survey day is defined here as a 24-hour activity period. The number of anticipated survey days was calculated as the number of days needed to reach the overall level of effort required to meet survey objectives assuming any single vessel covers, on average, 70 line km per 24 hours of operations.

Specific Geographic Region

The proposed survey activities will occur within the Project Area which includes the Lease Area and potential ECRs, as shown in Figure 1. The Lease Area is approximately 343.8 square kilometers (km^2) and is within the New Jersey wind energy area (WEA) of the

Bureau of Ocean Energy Management's Mid-Atlantic planning area. Water depths in the Lease Area range from 15 meters (m) to 35 m, and the potential ECRs extend from the shoreline to approximately 40 m depth.

BILLING CODE 3510–22–P

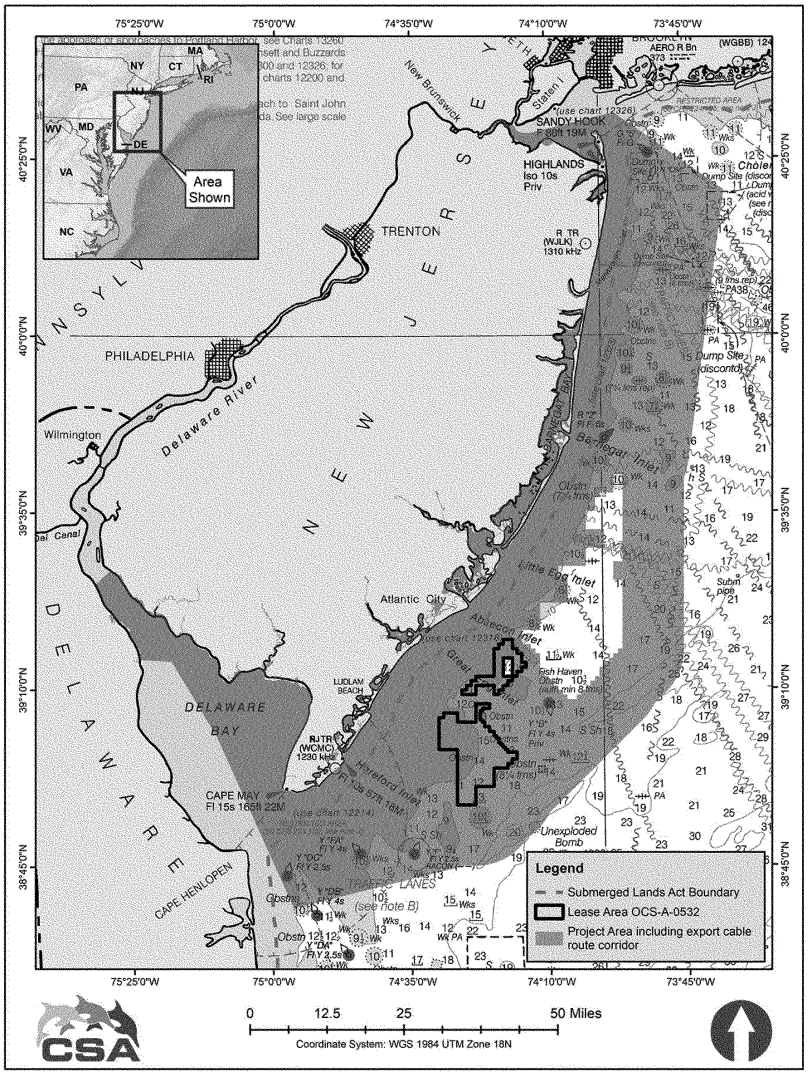


Figure 1—Site Characterization Survey Location, Including the Lease Area and Potential ECRs<

BILLING CODE 3510–22–C

Detailed Description of Specific Activity

Ocean Wind proposes to conduct HRG survey operations, including multibeam depth sounding, seafloor imaging, and shallow and medium penetration sub-bottom profiling. The HRG surveys may be conducted using any or all of the following equipment types: Side scan sonar, multibeam echosounder, magnetometers and gradiometers, parametric sub-bottom profiler (SBP), compressed high intensity radar pulse (CHIRP) SBP, boomers, or sparkers. Ocean Wind assumes that HRG survey operations would be conducted 24 hours per day, with an assumed daily survey distance of 70 km. Vessels would generally conduct survey effort at a transit speed of approximately 4 knots (kn), which equates to 110 km per 24-hr period. However, based on past survey experience (*i.e.,* knowledge of typical daily downtime due to weather, system malfunctions, etc.) Ocean Wind assumes 70 km as the average daily distance. On this basis, a total of 275 survey days are expected. In certain shallow-water areas, vessels may conduct survey effort during daylight hours only, with a corresponding assumption that the daily survey distance would be halved (35 km). However, for purposes of analysis all survey days are assumed to cover the maximum 70 km. A maximum of two vessels would operate concurrently in areas where 24-hr operations would be conducted, with an additional third vessel potentially conducting daylight-only survey effort in shallow-water areas.

Acoustic sources planned for use during HRG survey activities proposed by Ocean Wind include the following:

- Shallow penetration, non-impulsive, non-parametric SBPs (*i.e.,* CHIRP SBPs) are used to map the near-surface stratigraphy (top 0 to 10 m) of sediment below seabed. A CHIRP system emits signals covering a frequency sweep from approximately 2 to 20 kilohertz (kHz) over time. The frequency range can be adjusted to meet

project variables. These sources are typically mounted on a pole rather than towed, reducing the likelihood that an animal would be exposed to the signal.

- Medium penetration, impulsive sources (*i.e.,* boomers and sparkers) are used to map deeper subsurface stratigraphy. A boomer is a broadband source operating in the 3.5 Hertz (Hz) to 10 kHz frequency range. Sparkers create omnidirectional acoustic pulses from 50 Hz to 4 kHz. These sources are typically towed behind the vessel.

Operation of the following survey equipment types is not expected to present reasonable risk of marine mammal take, and will not be discussed further beyond the brief summaries provided below.

- Non-impulsive, parametric SBPs are used for providing high data density in sub-bottom profiles that are typically required for cable routes, very shallow water, and archaeological surveys. These sources generate short, very narrow-beam (1° to 3.5°) signals at high frequencies (generally around 85–100 kHz). The narrow beamwidth significantly reduces the potential that a marine mammal could be exposed to the signal, while the high frequency of operation means that the signal is rapidly attenuated in seawater. These sources are typically deployed on a pole rather than towed behind the vessel.
- Acoustic corers are seabed-mounted sources with three distinct sound sources: A high-frequency parametric sonar, a high-frequency CHIRP sonar, and a low-frequency CHIRP sonar. The beamwidth is narrow (3.5° to 8°) and the source is operated roughly 3.5 meter (m) above the seabed with the transducer pointed directly downward.
- Ultra-short baseline (USBL) positioning systems are used to provide high accuracy ranges by measuring the time between the acoustic pulses transmitted by the vessel transceiver and a transponder (or beacon) necessary to produce the acoustic profile. It is a two-component system with a pole-mounted transceiver and one or several transponders mounted on other survey equipment. USBLs are expected to produce extremely small acoustic propagation distances in their typical operating configuration.
- Multibeam echosounders (MBESs) are used to determine water depths and general bottom topography. The proposed MBESs all have operating frequencies >180 kHz and are therefore outside the general hearing range of marine mammals.
- Side scan sonars (SSS) are used for seabed sediment classification purposes and to identify natural and man-made acoustic targets on the seafloor. The proposed SSSs all have operating frequencies >180 kHz and are therefore outside the general hearing range of marine mammals.

Table 1 identifies representative survey equipment with the expected potential to result in exposure of marine mammals and potentially result in take. The make and model of the listed geophysical equipment may vary depending on availability and the final equipment choices will vary depending upon the final survey design, vessel availability, and survey contractor selection.

TABLE 1—SUMMARY OF REPRESENTATIVE HRG EQUIPMENT

Equipment	Operating frequency (kHz)	SL_{rms} (dB re 1 µPa m)	SL_{o-pk} (dB re 1 µPa m)	Pulse duration (width) (millisecond)	Repetition rate (Hz)	Beamwidth (degrees)	CF= Crocker and Fratantonio (2016) MAN = Manufacturer
Non-parametric shallow penetration SBPs (non-impulsive)							
ET 216 (2000DS or 3200 top unit)	2–16 2–8	195	-	20	6	24	MAN
ET 424 3200–X	4–24	176	-	3.4	2	71	CF
ET 512i	0.7–12	179	-	9	8	80	CF
GeoPulse 5430A	2–17	196	-	50	10	55	MAN
Teledyne Benthos Chirp III—TTV 170	2–7	197	-	60	15	100	MAN
Pangeo SBI	4.5–12.5	188	-	4.5	45	120	MAN
Medium penetration SBPs (impulsive)							
AA, Dura-spark UHD (400 tips, 500 J)[1]	0.3–1.2	203	211	1.1	4	Omni	CF
AA, Dura-spark UHD Sparker Model 400 × 400[1]	0.3–1.2	203	211	1.1	4	Omni	CF
GeoMarine, Dual 400 Sparker, Model Geo-Source 800[1]	0.4–5	203	211	1.1	4	Omni	CF
GeoMarine Sparker, Model Geo-Source 200–400[1]	0.3–1.2	203	211	1.1	4	Omni	CF
GeoMarine Sparker, Model Geo-Source 200 Lightweight[1].	0.3–1.2	203	211	1.1	4	Omni	CF
AA, triple plate S-Boom (700–1,000 J)[2]	0.1–5	205	211	0.6	4	80	CF

- = not applicable; µPa = micropascal; AA = Applied Acoustics; dB = decibel; ET = EdgeTech; J = joule; Omni = omnidirectional source; re = referenced to; PK = zero-to-peak sound pressure level; SL = source level; SPL = root-mean-square sound pressure level; UHD = ultra-high definition.

[1] The Dura-spark measurements and specifications provided in Crocker and Fratantonio (2016) were used for all sparker systems proposed for the survey. These include variants of the Dura-spark sparker system and various configurations of the GeoMarine Geo-Source sparker system. The data provided in Crocker and Fratantonio (2016) represent the most applicable data for similar sparker systems with comparable operating methods and settings when manufacturer or other reliable measurements are not available.

[2] Crocker and Fratantonio (2016) provide S-Boom measurements using two different power sources (CSP–D700 and CSP–N). The CSP–D700 power source was used in the 700 J measurements but not in the 1,000 J measurements. The CSP–N source was measured for both 700 J and 1,000 J operations but resulted in a lower SL; therefore, the single maximum SL value was used for both operational levels of the S-Boom.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.fisheries.noaa.gov/find-species*).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this action, and summarizes information related to the population or stock, including

regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, NMFS follows the Committee on Taxonomy (2021. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no mortality is anticipated or would be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 2 are the most recent available at the time of publication and are available in the Draft 2021 SARs (Hayes *et al.,* 2021), available at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports.*

TABLE 2—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE AFFECTED BY OCEAN WIND'S ACTIVITY

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidae:						
North Atlantic right whale	*Eubalaena glacialis*	Western North Atlantic (WNA).	E/D; Y	368 (0; 364; 2019)	0.7	7.7
Family Balaenopteridae (rorquals)						
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-/-; Y	1,393 (0.15; 1,375; 2016)	22	58
Fin whale	*Balaenoptera physalus*	WNA	E/D; Y	6,802 (0.24; 5,573; 2016)	11	2.35
Sei whale	*Balaenoptera borealis*	Nova Scotia	E/D; Y	6,292 (1.02; 3,098; 2016)	6.2	1.2
Minke whale	*Balaenoptera acutorostrata*	Canadian East Coast	-/-; N	21,968 (0.31; 17,002; 2016)	170	10.6
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	North Atlantic	E/D; Y	4,349 (0.28;3,451; 2016)	3.9	0
Family Delphinidae:						
Long-finned pilot whale	*Globicephala melas*	WNA	-/-; N	39,215 (0.30; 30,627; 2016)	306	29
Short finned pilot whale	*Globicephala macrorhynchus*	WNA	-/-; N	28,924 (0.24; 23,637; 2016)	236	136
Bottlenose dolphin	*Tursiops truncatus*	WNA Offshore	-/-; N	62,851 (0.23; 51,914; 2016)	519	28
		WNA Northern Migratory Coastal.	-/D;Y	6,639 (0.41, 4,759, 2016)	48	12.2–21.5
Common dolphin	*Delphinus delphis*	WNA	-/-; N	172,974 (0.21; 145,216; 2016)	1,452	390
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	WNA	-/-; N	93,233 (0.71; 54,443; 2016)	544	27
Atlantic spotted dolphin	*Stenella frontalis*	WNA	-/-; N	39,921 (0.27; 32,032; 2016)	320	0
Risso's dolphin	*Grampus griseus*	WNA	-/-; N	35,215 (0.19; 30,051; 2016)	303	54.3
Family Phocoenidae: (porpoises)						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy.	-/-; N	95,543 (0.31; 74,034; 2016)	851	164
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae: (earless seals)						
Gray seal [4]	*Halichoerus grypus*	WNA	-/-; N	27,300 (0.22; 22,785, 2029)	1,458	4,453
Harbor seal	*Phoca vitulina*	WNA	-/-; N	61,336 (0.08; 57,637, 2020)	1,729	339

[1] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike).

[4] NMFS' gray seal stock abundance estimate (and associated PBR value) applies to U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,600. The annual M/SI value given is for the total stock.

As indicated above, all 16 species (with 17 managed stocks) in Table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. In addition to what is included in Sections 3 and 4 of the application, the SARs, and NMFS' website, further detail informing the baseline for select species (*i.e.,* information regarding current Unusual Mortality Events (UME) and important habitat areas) is provided below.

North Atlantic Right Whale

The North Atlantic right whale is considered one of the most critically endangered populations of large whales in the world and has been listed as a Federal endangered species since 1970. The Western Atlantic stock is considered depleted under the MMPA (Hayes *et al.* 2021). There is a recovery plan (NOAA Fisheries 2017) for the right whale and recently there was a five-year review of the species (NOAA Fisheries 2017). The right whale had a

2.8 percent recovery rate between 1990 and 2011 (Hayes *et al.* 2021).

Elevated North Atlantic right whale mortalities have occurred since June 7, 2017, along the U.S. and Canadian coast with the leading category for the cause of death for this UME as ''human interaction,'' specifically from entanglements or vessel strikes. As of February 8, 2022, a total of 34 confirmed dead stranded whales (21 in Canada; 13 in the United States) have been documented. The cumulative total number of animals in the North Atlantic right whale UME has been updated to 50 individuals to include both the confirmed mortalities (dead stranded or floaters) (n=34) and seriously injured free-swimming whales (n=16) to better reflect the confirmed number of whales likely removed from the population during the UME and more accurately reflect the population impacts. More information is available online at: *www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event.*

The proposed survey area is part of a migratory corridor Biologically Important Area (BIA) for North Atlantic right whales (effective March–April and November–December) that extends from Massachusetts to Florida (LeBrecque *et al.,* 2015). Off the coast of New Jersey, the migratory BIA extends from the coast to beyond the shelf break. This important migratory area is approximately 269,488 km² in size (compared with the approximately 5,500 km² of total estimated Level B harassment ensonified area associated with the 275 planned survey days) and is comprised of the waters of the continental shelf offshore the East Coast of the United States, extending from Florida through Massachusetts. NMFS' regulations at 50 CFR part 224.105 designated nearshore waters of the Mid-Atlantic Bight as Mid-Atlantic U.S. Seasonal Management Areas (SMA) for right whales in 2008. SMAs were developed to reduce the threat of collisions between ships and right whales around their migratory route and calving grounds. A portion of one SMA, which occurs off the mouth of Delaware Bay, overlaps spatially with a section of the proposed survey area. The SMA which occurs off the mouth of Delaware Bay is active from November 1 through April 30 of each year.

Humpback Whale

NMFS recently evaluated the status of the species, and on September 8, 2016, NMFS divided the species into 14 distinct population segments (DPS), removed the species-level listing, and in its place listed four DPSs as endangered and one DPS as threatened (81 FR 62260; September 8, 2016). The remaining nine DPSs were not listed. The West Indies DPS, which is not listed under the ESA, is the only DPS of humpback whale that is expected to occur in the survey area. Bettridge *et al.* (2015) estimated the size of this population at 12,312 (95 percent CI 8,688–15,954) whales in 2004–05, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.,* 2003; Smith *et al.,* 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.,* 2015). Whales occurring in the survey area are considered to be from the West Indies DPS, but are not necessarily from the Gulf of Maine feeding population managed as a stock by NMFS. Barco *et al.,* 2002 estimated that, based on photo-identification, only 39 percent of individual humpback whales observed along the mid- and south Atlantic U.S. coast are from the Gulf of Maine stock.

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine to Florida. Partial or full necropsy examinations have been conducted on approximately half of the 156 known cases (as of February 8, 2022). Of the whales examined, about 50 percent had evidence of human interaction, either ship strike or entanglement. While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. NOAA is consulting with researchers that are conducting studies on the humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could provide additional insight into how these vessel interactions occurred. More information is available at: *www.fisheries.noaa.gov/national/marine-life-distress/2016-2021-humpback-whale-unusual-mortality-event-along-atlantic-coast.*

Minke Whale

Since January 2017, elevated minke whale mortalities have occurred along the Atlantic coast from Maine through South Carolina, with a total of 122 strandings (as of February 8, 2022). This event has been declared a UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease, but these findings are not consistent across all of the whales examined, so more research is needed. More information is available at: *www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-minke-whale-unusual-mortality-event-along-atlantic-coast.*

Seals

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire and Massachusetts. This event has been declared a UME. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated numbers, therefore the UME investigation now encompasses all seal strandings from Maine to Virginia. Ice seals (harp and hooded seals) have also started stranding with clinical signs, again not in elevated numbers, and those two seal species have also been added to the UME investigation. A total of 3,152 reported strandings (of all species) had occurred from July 1, 2018, through March 13, 2020. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME. Closure of this UME is pending. Information on this UME is available online at: *www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency

cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Sixteen marine mammal species (14 cetacean and 2 pinniped (both phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), eight are classified as mid-frequency cetaceans (*i.e.,* all delphinid species and the sperm whale), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary of the ways that Ocean Wind's specified activity may impact marine mammals and their habitat. Detailed descriptions of the potential effects of similar specified activities have been provided in other recent **Federal Register** notices, including for survey activities using the same methodology, over a similar amount of time, in the Mid-Atlantic region, including New Jersey waters. (*e.g.,* 82 FR 20563, May 3, 2017; 85 FR 36537, June 17, 2020; 85 FR 37848, June 24, 2020; 85 FR 48179, August 10, 2020, 86 FR 11239, February 24, 2021; 86 FR 28061, May 25, 2021). No significant new information is available, and we refer the reader to these documents rather than repeating the details here. The Estimated Take section includes a quantitative analysis of the number of individuals that are expected to be taken by Ocean Wind's activity. The Negligible Impact Analysis and Determination section considers the potential effects of the specified activity, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Background on Active Acoustic Sound Sources and Acoustic Terminology

This subsection contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to the summary of the potential effects of the specified activity on marine mammals. For general information on sound and its interaction with the marine environment, please see, *e.g.,* Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983).

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the ''loudness'' of a sound and is typically described using the relative unit of the decibel. A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)), and is a logarithmic unit that accounts for large variations in amplitude. Therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa), while the received level is the SPL at the listener's position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 μPa^2-s) represents the total energy in a stated frequency band over a stated time interval or event and considers both intensity and duration of exposure. The per-pulse SEL is calculated over the time window containing the entire pulse (*i.e.,* 100 percent of the acoustic energy). SEL is a cumulative metric; it can be accumulated over a single pulse, or

calculated over periods containing multiple pulses. Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0–pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source and is represented in the same units as the rms sound pressure.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for sound produced by the pile driving activity considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals. Details of source types are described in the following text.

Sounds are often considered to fall into one of two general types: Pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts. The distinction between these two sound types is not always obvious, as certain signals share properties of both pulsed and non-pulsed sounds. A signal near a source could be categorized as a pulse, but due to propagation effects as it moves farther from the source, the signal duration becomes longer (*e.g.,* Greene and Richardson, 1988).

Pulsed sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Sparkers and boomers produce pulsed signals with energy in the frequency ranges specified in Table 1. The amplitude of the acoustic wave emitted from sparker sources is equal in all directions (*i.e.,* omnidirectional), while other sources planned for use during the proposed surveys have some degree of directionality to the beam, as specified in Table 1. Other sources planned for use during the proposed survey activity (*e.g.,* CHIRP SBPs) should be considered non-pulsed, intermittent sources.

Summary on Specific Potential Effects of Acoustic Sound Sources

Underwater sound from active acoustic sources can include one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking. The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007).

Animals in the vicinity of Ocean Wind's proposed HRG survey activity are unlikely to incur even TTS due to the characteristics of the sound sources, which include relatively low source levels (176 to 205 dB re 1 µPa-m) and generally very short pulses and potential duration of exposure. These characteristics mean that instantaneous

exposure is unlikely to cause TTS, as it is unlikely that exposure would occur close enough to the vessel for received levels to exceed peak pressure TTS criteria, and that the cumulative duration of exposure would be insufficient to exceed cumulative sound exposure level (SEL) criteria. Even for high-frequency cetacean species (*e.g.,* harbor porpoises), which have the greatest sensitivity to potential TTS, individuals would have to make a very close approach and also remain very close to vessels operating these sources in order to receive multiple exposures at relatively high levels, as would be necessary to cause TTS. Intermittent exposures—as would occur due to the brief, transient signals produced by these sources—require a higher cumulative SEL to induce TTS than would continuous exposures of the same duration (*i.e.,* intermittent exposure results in lower levels of TTS). Moreover, most marine mammals would more likely avoid a loud sound source rather than swim in such close proximity as to result in TTS. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a sub-bottom profiler emits a pulse is small—because if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS and would likely exhibit avoidance behavior to the area near the transducer rather than swim through at such a close range. Further, the restricted beam shape of many of HRG survey devices planned for use (Table 1) makes it unlikely that an animal would be exposed more than briefly during the passage of the vessel.

Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal.

In addition, sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. Marine mammal communications would not likely be masked appreciably by the acoustic signals given the directionality of the signals for most HRG survey equipment types planned for use (Table 1) and the brief period when an individual mammal is likely to be exposed.

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton) (*i.e.,* effects to marine mammal habitat). Prey species exposed to sound might move away from the sound source, experience TTS, experience masking of biologically relevant sounds, or show no obvious direct effects. The most likely impacts (if any) for most prey species in a given area would be temporary avoidance of the area. Surveys using active acoustic sound sources move through an area relatively quickly, limiting exposure to multiple pulses. In all cases, sound levels would return to ambient once a survey ends and the noise source is shut down and, when exposure to sound ends, behavioral and/or physiological responses are expected to end relatively quickly. Finally, the HRG survey equipment will not have significant impacts to the seafloor and does not represent a source of pollution.

Vessel Strike

Vessel collisions with marine mammals, or ship strikes, can result in death or serious injury of the animal. These interactions are typically associated with large whales, which are less maneuverable than are smaller cetaceans or pinnipeds in relation to large vessels. Ship strikes generally involve commercial shipping vessels, which are generally larger and of which there is much more traffic in the ocean than geophysical survey vessels. Jensen and Silber (2004) summarized ship strikes of large whales worldwide from 1975–2003 and found that most collisions occurred in the open ocean and involved large vessels (*e.g.,* commercial shipping). For vessels used in geophysical survey activities, vessel speed while towing gear is typically only 4–5 knots (4.6–5.7 mph). At these speeds, both the possibility of striking a marine mammal and the possibility of a strike resulting in serious injury or mortality are so low as to be discountable. At average transit speed for geophysical survey vessels, the probability of serious injury or mortality resulting from a strike is less than 50 percent. However, the likelihood of a strike actually happening is again low given the smaller size of these vessels and generally slower speeds. Notably in the Jensen and Silber study, no strike incidents were reported for geophysical survey vessels during that time period.

The potential effects of Ocean Wind's specified survey activity are expected to be limited to Level B behavioral harassment. No permanent or temporary auditory effects, or significant impacts to marine mammal habitat, including prey, are expected.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use, Level A harassment is neither anticipated (even absent mitigation), nor proposed to be authorized. Consideration of the anticipated effectiveness of the mitigation measures (*i.e.,* exclusion zones and shutdown measures), discussed in detail below in the Proposed Mitigation section, further strengthens the conclusion that Level A harassment is not a reasonably anticipated outcome of the survey activity. As described previously, no

serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS uses acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007; Ellison *et al.,* 2012). NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals may be behaviorally harassed (*i.e.,* Level B harassment) when exposed to underwater anthropogenic noise above received levels of 160 dB re 1 μPa (rms) for the impulsive sources (*i.e.,* boomers, sparkers) and non-impulsive, intermittent sources (*e.g.,* CHIRP SBPs) evaluated here for Ocean Wind's proposed activity.

Level A Harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). For more information, see NMFS' 2018 Technical Guidance, which may be accessed at *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

Ocean Wind's proposed activity includes the use of impulsive (*i.e.,* sparkers and boomers) and non-impulsive (*e.g.,* CHIRP SBP) sources. However, as discussed above, NMFS has concluded that Level A harassment is not a reasonably likely outcome for marine mammals exposed to noise through use of the sources proposed for use here, and the potential for Level A harassment is not evaluated further in this document. Please see Ocean Wind's application for details of a quantitative exposure analysis exercise, *i.e.,* calculated Level A harassment isopleths and estimated Level A harassment exposures. Maximum estimated Level A harassment isopleths were less than 5 m for all sources and hearing groups with the exception of an estimated 18 m and 21 m zone calculated for high-frequency cetaceans during use of the TB Chirp III and GeoPulse 5430 CHIRP SBP, respectively (see Table 1 for source characteristics). Ocean Wind did not request authorization of take by Level A harassment, and no take by Level A harassment is proposed for authorization by NMFS.

Ensonified Area

NMFS has developed a user-friendly methodology for estimating the extent of the Level B harassment isopleths associated with relevant HRG survey equipment (NMFS, 2020). This methodology incorporates frequency and directionality to refine estimated ensonified zones. For acoustic sources that operate with different beamwidths, the maximum beamwidth was used, and the lowest frequency of the source was used when calculating the frequency-dependent absorption coefficient (Table 1).

NMFS considers the data provided by Crocker and Fratantonio (2016) to represent the best available information on source levels associated with HRG equipment and, therefore, recommends that source levels provided by Crocker and Fratantonio (2016) be incorporated in the method described above to estimate isopleth distances to harassment thresholds. In cases when the source level for a specific type of HRG equipment is not provided in Crocker and Fratantonio (2016), NMFS recommends that either the source levels provided by the manufacturer be used, or, in instances where source levels provided by the manufacturer are unavailable or unreliable, a proxy from Crocker and Fratantonio (2016) be used instead. Table 1 shows the HRG equipment types that may be used during the proposed surveys and the source levels associated with those HRG equipment types.

Results of modeling using the methodology described above indicated that, of the HRG survey equipment planned for use by Ocean Wind that has the potential to result in Level B harassment of marine mammals, the Applied Acoustics Dura-Spark UHD and GeoMarine Geo-Source sparkers would produce the largest Level B harassment isopleth (141 m). Estimated Level B harassment isopleths for all sources evaluated here, including the sparkers, are provided in Table 4. Although Ocean Wind does not expect to use sparker sources on all planned survey days, it proposes to assume for purposes of analysis that the sparker would be used on all survey days. This is a conservative approach, as the actual sources used on individual survey days may produce smaller harassment distances.

TABLE 4—DISTANCES TO LEVEL B HARASSMENT THRESHOLD

[160 dB rms]

Equipment	Distance to Level B harassment threshold (m)
ET 216 CHIRP	9
ET 424 CHIRP	4
ET 512i CHIRP	6
GeoPulse 5430A	21
TB CHIRP III	48
Pangeo SBI	22
AA Triple plate S-Boom (700/1,000 J)	34
AA, Dura-spark UHD Sparkers	141
GeoMarine Sparkers	141

Marine Mammal Occurrence

In this section, NMFS provides information about the presence, density, or group dynamics of marine mammals that informs the take calculations.

Habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory (Roberts *et al.,* 2016, 2017, 2018, 2020) represent the best available information regarding marine mammal densities in the survey area. The density data presented by Roberts *et al.* (2016, 2017, 2018, 2020) incorporates aerial and shipboard line-transect survey data from NMFS and other organizations and

incorporates data from 8 physiographic and 16 dynamic oceanographic and biological covariates, and controls for the influence of sea state, group size, availability bias, and perception bias on the probability of making a sighting. These density models were originally developed for all cetacean taxa in the U.S. Atlantic (Roberts *et al.,* 2016). In subsequent years, certain models have been updated based on additional data as well as certain methodological improvements. More information is available online at *seamap.env.duke.edu/models/Duke-EC-GOM-2015/*. Marine mammal density estimates in the survey area (animals/km^2) were obtained using the most recent model results for all taxa (Roberts *et al.,* 2016, 2017, 2018, 2020). The updated models incorporate additional sighting data, including sightings from NOAA's Atlantic Marine Assessment Program for Protected Species (AMAPPS) surveys.

For the exposure analysis, density data from Roberts *et al.* (2016, 2017, 2018, 2020) were mapped using a geographic information system (GIS). Density grid cells that included any portion of the proposed survey area were selected for all survey months (see Figure 3 in Ocean Wind's application).

Densities from each of the selected density blocks were averaged for each month available to provide monthly density estimates for each species (when available based on the temporal resolution of the model products), along with the average annual density. Please see Tables 7 of Ocean Wind's application for density values used in the exposure estimation process. Additional data regarding average group sizes from survey effort in the region was considered to ensure adequate take estimates are evaluated.

Take Calculation and Estimation

Here NMFS describes how the information provided above is brought together to produce a quantitative take estimate. In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in harassment, radial distances to predicted isopleths corresponding to Level B harassment thresholds are calculated, as described above. The maximum distance (*i.e.,* 141 m distance associated with sparkers) to the Level B harassment criterion and the estimated trackline distance traveled per day by a given survey vessel (*i.e.,* 70 km) are then used to calculate the daily ensonified area, or zone of influence (ZOI) around the survey vessel.

The ZOI is a representation of the maximum extent of the ensonified area around a sound source over a 24-hr period. The ZOI for each piece of equipment operating below 200 kHz was calculated per the following formula:

$$ZOI = (Distance/day \times 2r) + \pi r^2$$

Where r is the linear distance from the source to the harassment isopleth.

ZOIs associated with all sources with the expected potential to cause take of marine mammals are provided in Table 6 of Ocean Wind's application. The largest daily ZOI (19.8 km^2), associated with the various sparkers proposed for use, was applied to all planned survey days.

Potential Level B harassment exposures are estimated by multiplying the average annual density of each species within either the Lease Area or potential ECR area by the daily ZOI. That product is then multiplied by the number of operating days expected for the survey in each area assessed, and the product is rounded to the nearest whole number. These results are shown in Table 5.

TABLE 5—SUMMARY OF TAKE NUMBERS PROPOSED FOR AUTHORIZATION

Species	Abundance	Level B harassment takes [1]	Max percent population
North Atlantic right whale	368	11	2.98
Fin whale	6,802	4	<1
Sei whale	6,292	0 (1)	<1
Minke whale	21,968	1	<1
Humpback whale	1,393	2	<1
Sperm whale [3]	4,349	0 (3)	<1
Atlantic white-sided dolphin	93,233	6 (50)	<1
Atlantic spotted dolphin	39,921	2 (15)	<1
Common bottlenose dolphin: [2]			
Offshore Stock	62,851	1,842	2.9
Migratory Stock	6,639		27.75
Pilot Whales: [3]			
Short-finned pilot whale	28,924	1 (20)	<1
Long-finned pilot whale	39,215	1 (20)	<1
Risso's dolphin	35,215	0 (30)	<1
Common dolphin	172,974	54 (400)	<1
Harbor porpoise	95,543	90	<1
Seals: [4]			
Gray seal	451,600	25	<1
Harbor seal	61,336	25	<1

[1] Parentheses denote proposed take authorization where different from calculated take estimates. Increases from calculated values are based on assumed average group size for the species; sei whale, Kenney and Vigness-Raposa, 2010; sperm whale and Risso's dolphin, Barkaszi and Kelly, 2018.

[2] At this time, Orsted is not able to identify how much work would occur inshore and offshore of the 20 m isobaths, a common delineation between offshore and coastal bottlenose dolphin stocks. Because Roberts *et al.* does not provide density estimates for individual stocks of common bottlenose dolphins, the take presented here is the total estimated take for both stocks. Although unlikely, for our analysis, we assume all takes could be allocated to either stock.

[3] Roberts (2018) only provides density estimates for pilot whales as a guild. The pilot whale density values were applied to both species of pilot whale; therefore, the total take number proposed for authorization for pilot whales (4) is double the estimated take number for the guild.

[4] Roberts (2018) only provides density estimates for seals without differentiating by species. Harbor seals and gray seals are assumed to occur equally; therefore, density values were split evenly between the two species, *i.e.,* total estimated take for ''seals'' is 22.

The take numbers shown in Table 5 are those requested by Ocean Wind. NMFS concurs with the requested take numbers and proposes to authorize them. Previous monitoring data compiled by Ocean Wind (available online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-marine-site-characterization-surveys-offshore-new*) suggests that the proposed take numbers for authorization are sufficient.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

Mitigation for Marine Mammals and Their Habitat

NMFS proposes the following mitigation measures be implemented during Ocean Wind's proposed marine site characterization surveys. Pursuant to section 7 of the ESA, Ocean Wind would also be required to adhere to relevant Project Design Criteria (PDC) of the NMFS' Greater Atlantic Regional Fisheries Office (GARFO) programmatic consultation (specifically PDCs 4, 5, and 7) regarding geophysical surveys along the U.S. Atlantic coast (*https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic#offshore-wind-site-assessment-and-site-characterization-activities-programmatic-consultation*).

Marine Mammal Exclusion Zones and Harassment Zones

Marine mammal exclusion zones (EZ) would be established around the HRG survey equipment and monitored by protected species observers (PSOs):

- 500 m EZ for North Atlantic right whales during use of specified acoustic sources (sparkers, boomers, and non-parametric sub-bottom profilers).
- 100 m EZ for all other marine mammals, with certain exceptions specified below, during operation of impulsive acoustic sources (boomer and/or sparker).

If a marine mammal is detected approaching or entering the EZs during the HRG survey, the vessel operator would adhere to the shutdown procedures described below to minimize noise impacts on the animals. These stated requirements will be included in the site-specific training to be provided to the survey team. We note that in their application, Ocean Wind requested an EZ of 50 m for all dolphins, seals, and porpoises and also requested that the shutdown requirements be waived for all dolphin, seal, and porpoise species for which take is authorized. NMFS has preliminarily determined that the standard 100 m EZ for these species is appropriate, with only limited waiver of shutdown requirements as described in the *Shutdown Procedures* section below.

Pre-Start Clearance

Marine mammal clearance zones would be established around the HRG survey equipment and monitored by protected species observers (PSOs):

- 500 m for all ESA-listed marine mammals; and
- 100 m for non all other marine mammals.

Ocean Wind would implement a 30-minute pre-start clearance period prior to the initiation of ramp-up of specified HRG equipment (see exception to this requirement in the *Shutdown Procedures* section below) During this period, clearance zones will be monitored by the PSOs, using the appropriate visual technology. Ramp-up may not be initiated if any marine mammal(s) is within its respective clearance zone. If a marine mammal is observed within an clearance zone during the pre-start clearance period, ramp-up may not begin until the animal(s) has been observed exiting its respective exclusion zone or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species).

Ramp-Up of Survey Equipment

A ramp-up procedure, involving a gradual increase in source level output, is required at all times as part of the activation of the acoustic source when technically feasible. The ramp-up procedure would be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the survey area by allowing them to vacate the area prior to the commencement of survey equipment operation at full power. Operators should ramp up sources to half power for 5 minutes and then proceed to full power.

Ramp-up activities will be delayed if a marine mammal(s) enters its respective exclusion zone. Ramp-up will continue if the animal has been observed exiting its respective exclusion zone or until an additional time period has elapsed with no further sighting (*i.e,* 15 minutes for small odontocetes and seals and 30 minutes for all other species).

Ramp-up may occur at times of poor visibility, including nighttime, if appropriate visual monitoring has occurred with no detections of marine mammals in the 30 minutes prior to beginning ramp-up. Acoustic source activation may only occur at night where operational planning cannot reasonably avoid such circumstances.

Shutdown Procedures

An immediate shutdown of the impulsive HRG survey equipment would be required if a marine mammal is sighted entering or within its respective exclusion zone. The vessel operator must comply immediately with any call for shutdown by the Lead PSO. Any disagreement between the Lead PSO and vessel operator should be discussed only after shutdown has occurred. Subsequent restart of the survey equipment can be initiated if the animal has been observed exiting its respective exclusion zone or until an additional time period has elapsed (*i.e.,*

15 minutes for harbor porpoise, 30 minutes for all other species).

If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the Level B harassment zone (Table 4), shutdown would occur.

If the acoustic source is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, it may be activated again without ramp-up if PSOs have maintained constant observation and no detections of any marine mammal have occurred within the respective exclusion zones. If the acoustic source is shut down for a period longer than 30 minutes, then pre-clearance and ramp-up procedures will be initiated as described in the previous section.

The shutdown requirement would be waived for pinnipeds and for small delphinids of the following genera: *Delphinus, Lagenorhynchus, Stenella,* and *Tursiops.* Specifically, if a delphinid from the specified genera or a pinniped is visually detected approaching the vessel (*i.e.,* to bow ride) or towed equipment, shutdown is not required. Furthermore, if there is uncertainty regarding identification of a marine mammal species (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs must use best professional judgement in making the decision to call for a shutdown. Additionally, shutdown is required if a delphinid or pinniped detected in the exclusion zone and belongs to a genus other than those specified.

Shutdown, pre-start clearance, and ramp-up procedures are not required during HRG survey operations using only non-impulsive sources (*e.g.,* echosounders) other than non-parametric sub-bottom profilers (*e.g.,* CHIRPs).

Vessel Strike Avoidance

Ocean Wind must adhere to the following measures except in the case where compliance would create an imminent and serious threat to a person or vessel or to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply.

- Vessel operators and crews must maintain a vigilant watch for all protected species and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any protected species. A visual observer aboard the vessel must monitor a vessel strike avoidance zone based on the appropriate separation distance around the vessel (distances stated below). Visual observers monitoring the vessel strike avoidance zone may be third-party observers (*i.e.,* PSOs) or crew members, but crew members responsible for these duties must be provided sufficient training to (1) distinguish protected species from other phenomena and (2) broadly to identify a marine mammal as a right whale, other whale (defined in this context as sperm whales or baleen whales other than right whales), or other marine mammal.
- Members of the monitoring team will consult NMFS North Atlantic right whale reporting system and Whale Alert, as able, for the presence of North Atlantic right whales throughout survey operations, and for the establishment of a DMA. If NMFS should establish a DMA in the survey area during the survey, the vessels will abide by speed restrictions in the DMA.
- All survey vessels, regardless of size, must observe a 10-knot speed restriction in specific areas designated by NMFS for the protection of North Atlantic right whales from vessel strikes including seasonal management areas (SMAs) and dynamic management areas (DMAs) when in effect;
- All vessels greater than or equal to 19.8 m in overall length operating from November 1 through April 30 will operate at speeds of 10 knots or less at all times;
- All vessels must reduce their speed to 10 knots or less when mother/calf pairs, pods, or large assemblages of cetaceans are observed near a vessel;
- All vessels must maintain a minimum separation distance of 500 m from right whales and other ESA-listed large whales;
- If a whale is observed but cannot be confirmed as a species other than a right whale or other ESA-listed large whale, the vessel operator must assume that it is a right whale and take appropriate action;
- All vessels must maintain a minimum separation distance of 100 m from non-ESA listed whales;
- All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an understanding that at times this may not be possible (*e.g.,* for animals that approach the vessel).
- When marine mammals are sighted while a vessel is underway, the vessel shall take action as necessary to avoid violating the relevant separation distance (*e.g.,* attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If marine mammals are sighted within the relevant separation distance, the vessel must reduce speed and shift the engine to neutral, not engaging the engines until animals are clear of the area. This does not apply to any vessel towing gear or any vessel that is navigationally constrained.

Project-specific training will be conducted for all vessel crew prior to the start of a survey and during any changes in crew such that all survey personnel are fully aware and understand the mitigation, monitoring, and reporting requirements. Prior to implementation with vessel crews, the training program will be provided to NMFS for review and approval. Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew member understands and will comply with the necessary requirements throughout the survey activities.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);

- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Proposed Monitoring Measures

Visual monitoring will be performed by qualified, NMFS-approved PSOs, the resumes of whom will be provided to NMFS for review and approval prior to the start of survey activities. Ocean Wind would employ independent, dedicated, trained PSOs, meaning that the PSOs must (1) be employed by a third-party observer provider, (2) have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements (including brief alerts regarding maritime hazards), and (3) have successfully completed an approved PSO training course appropriate for their designated task. On a case-by-case basis, non-independent observers may be approved by NMFS for limited, specific duties in support of approved, independent PSOs on smaller vessels with limited crew capacity operating in nearshore waters. Section 5 of the draft IHA contains further details regarding PSO approval.

The PSOs will be responsible for monitoring the waters surrounding each survey vessel to the farthest extent permitted by sighting conditions, including exclusion zones, during all HRG survey operations. PSOs will visually monitor and identify marine mammals, including those approaching or entering the established exclusion zones during survey activities. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

During all HRG survey operations (*e.g.,* any day on which use of an HRG source is planned to occur), a minimum of one PSO must be on duty during daylight operations on each survey vessel, conducting visual observations at all times on all active survey vessels during daylight hours (*i.e.,* from 30 minutes prior to sunrise through 30 minutes following sunset). Two PSOs will be on watch during nighttime operations. The PSO(s) would ensure 360° visual coverage around the vessel from the most appropriate observation posts and would conduct visual observations using binoculars and/or night vision goggles and the naked eye while free from distractions and in a consistent, systematic, and diligent manner. PSOs may be on watch for a maximum of 4 consecutive hours followed by a break of at least 2 hours between watches and may conduct a maximum of 12 hours of observation per 24-hr period. In cases where multiple vessels are surveying concurrently, any observations of marine mammals would be communicated to PSOs on all nearby survey vessels.

PSOs must be equipped with binoculars and have the ability to estimate distance and bearing to detect marine mammals, particularly in proximity to exclusion zones. Reticulated binoculars must also be available to PSOs for use as appropriate based on conditions and visibility to support the sighting and monitoring of marine mammals. During nighttime operations, night-vision goggles with thermal clip-ons and infrared technology would be used. Position data would be recorded using hand-held or vessel GPS units for each sighting.

During good conditions (*e.g.,* daylight hours; Beaufort sea state (BSS) 3 or less), to the maximum extent practicable, PSOs would also conduct observations when the acoustic source is not operating for comparison of sighting rates and behavior with and without use of the active acoustic sources. Any observations of marine mammals by crew members aboard any vessel associated with the survey would be relayed to the PSO team.

Data on all PSO observations would be recorded based on standard PSO collection requirements. This would include dates, times, and locations of survey operations; dates and times of observations, location and weather; details of marine mammal sightings (*e.g.,* species, numbers, behavior); and details of any observed marine mammal behavior that occurs (*e.g.,* noted behavioral disturbances).

Proposed Reporting Measures

Within 90 days after completion of survey activities or expiration of this IHA, whichever comes sooner, a final technical report will be provided to NMFS that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, summarizes the number of marine mammals observed during survey activities (by species, when known), summarizes the mitigation actions taken during surveys (including what type of mitigation and the species and number of animals that prompted the mitigation action, when known), and provides an interpretation of the results and effectiveness of all mitigation and monitoring. A final report must be submitted within 30 days following resolution of any comments on the draft report. All draft and final marine mammal and acoustic monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.Daly@noaa.gov.* The report must contain at minimum, the following:

- PSO names and affiliations;
- Dates of departures and returns to port with port name;
- Dates and times (Greenwich Mean Time) of survey effort and times corresponding with PSO effort;
- Vessel location (latitude/longitude) when survey effort begins and ends; vessel location at beginning and end of visual PSO duty shifts;
- Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any line change;
- Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions change significantly), including wind speed and direction, Beaufort sea state, Beaufort wind force, swell height, weather conditions, cloud cover, sun glare, and overall visibility to the horizon;
- Factors that may be contributing to impaired observations during each PSO shift change or as needed as environmental conditions change (*e.g.,* vessel traffic, equipment malfunctions); and
- Survey activity information, such as type of survey equipment in operation, acoustic source power output while in operation, and any other notes of significance (*i.e.,* pre-start clearance

survey, ramp-up, shutdown, end of operations, etc.).

If a marine mammal is sighted, the following information should be recorded:

- Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);
- PSO who sighted the animal;
- Time of sighting;
- Vessel location at time of sighting;
- Water depth;
- Direction of vessel's travel (compass direction);
- Direction of animal's travel relative to the vessel;
- Pace of the animal;
- Estimated distance to the animal and its heading relative to vessel at initial sighting;
- Identification of the animal (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified); also note the composition of the group if there is a mix of species;
- Estimated number of animals (high/low/best);
- Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, etc.);
- Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);
- Detailed behavior observations (*e.g.,* number of blows, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);
- Animal's closest point of approach and/or closest distance from the center point of the acoustic source;
- Platform activity at time of sighting (*e.g.,* deploying, recovering, testing, data acquisition, other); and
- Description of any actions implemented in response to the sighting (*e.g.,* delays, shutdown, ramp-up, speed or course alteration, etc.) and time and location of the action.

If a North Atlantic right whale is observed at any time by PSOs or personnel on any project vessels, during surveys or during vessel transit, Ocean Wind must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System: (866) 755–6622. North Atlantic right whale sightings in any location may also be reported to the U.S. Coast Guard via channel 16.

In the event that Ocean Wind personnel discover an injured or dead marine mammal, Ocean Wind will report the incident to the NMFS Office of Protected Resources (OPR) and the NMFS New England/Mid-Atlantic Stranding Coordinator as soon as feasible. The report would include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

In the unanticipated event of a ship strike of a marine mammal by any vessel involved in the activities covered by the IHA, Ocean Wind would report the incident to the NMFS OPR and the NMFS New England/Mid-Atlantic Stranding Coordinator as soon as feasible. The report would include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Species identification (if known) or description of the animal(s) involved;
- Vessel's speed during and leading up to the incident;
- Vessel's course/heading and what operations were being conducted (if applicable);
- Status of all sound sources in use;
- Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;
- Estimated size and length of animal that was struck;
- Description of the behavior of the marine mammal immediately preceding and following the strike;
- If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;
- Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and
- To the extent practicable, photographs or video footage of the animal(s).

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. NMFS also assesses the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all the species listed in Table 5 given that NMFS expects the anticipated effects of the proposed survey to be similar in nature. Where there are meaningful differences between species or stocks—as is the case of the North Atlantic right whale—they are included as separate subsections below. NMFS does not anticipate that serious injury or mortality would occur as a result from HRG surveys, even in the absence of mitigation, and no serious injury or mortality is proposed to be authorized. As discussed in the Potential Effects section, non-auditory physical effects and vessel strike are not expected to occur. NMFS expects that all potential takes would be in the form of short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity was occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007). Even repeated Level B harassment of some small subset of an overall stock is unlikely to result in any significant

realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. As described above, Level A harassment is not expected to occur given the nature of the operations, the estimated size of the Level A harassment zones, and the required shutdown zones for certain activities.

In addition to being temporary, the maximum expected harassment zone around a survey vessel is 141 m. Although this distance is assumed for all survey activity in estimating take numbers proposed for authorization and evaluated here, in reality much of the survey activity would involve use of non-impulsive acoustic sources with a reduced acoustic harassment zone of 48 m, producing expected effects of particularly low severity. Therefore, the ensonified area surrounding each vessel is relatively small compared to the overall distribution of the animals in the area and their use of the habitat. Feeding behavior is not likely to be significantly impacted as prey species are mobile and are broadly distributed throughout the survey area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

There are no rookeries, mating or calving grounds known to be biologically important to marine mammals within the proposed survey area and there are no feeding areas known to be biologically important to marine mammals within the proposed survey area. There is no designated critical habitat for any ESA-listed marine mammals in the proposed survey area.

North Atlantic Right Whales

The status of the North Atlantic right whale population is of heightened concern and, therefore, merits additional analysis. As noted previously, elevated North Atlantic right whale mortalities began in June 2017 and there is an active UME. Overall, preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of right whales. As noted previously, the proposed survey area overlaps a migratory corridor BIA for North Atlantic right whales. Due to the fact that the proposed survey activities are temporary and the spatial extent of sound produced by the survey would be very small relative to the spatial extent of the available migratory habitat in the BIA, right whale migration is not expected to be impacted by the proposed survey. Given the relatively small size of the ensonified area, it is unlikely that prey availability would be adversely affected by HRG survey operations. Required vessel strike avoidance measures will also decrease risk of ship strike during migration; no ship strike is expected to occur during Ocean Wind's proposed activities. Additionally, only very limited take by Level B harassment of North Atlantic right whales has been requested and is being proposed for authorization by NMFS as HRG survey operations are required to maintain a 500 m EZ and shutdown if a North Atlantic right whale is sighted at or within the EZ. The 500 m shutdown zone for right whales is conservative, considering the Level B harassment isopleth for the most impactful acoustic source (*i.e.,* sparker) is estimated to be 141 m, and thereby minimizes the potential for behavioral harassment of this species. As noted previously, Level A harassment is not expected due to the small PTS zones associated with HRG equipment types proposed for use. NMFS does not anticipate North Atlantic right whales takes that would result from Ocean Wind's proposed activities would impact annual rates of recruitment or survival. Thus, any takes that occur would not result in population level impacts.

Other Marine Mammal Species With Active UMEs

As noted previously, there are several active UMEs occurring in the vicinity of Ocean Wind's proposed survey area. Elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately half had evidence of human interaction (ship strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS) remains stable at approximately 12,000 individuals.

Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. This event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 20,000 whales.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and have occurred across Maine, New Hampshire, and Massachusetts. Based on tests conducted so far, the main pathogen found in the seals is phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. The UME does not yet provide cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 75,000 and annual M/SI (350) is well below PBR (2,006) (Hayes *et al.,* 2020). The population abundance for gray seals in the United States is over 27,000, with an estimated abundance, including seals in Canada, of approximately 450,000. In addition, the abundance of gray seals is likely increasing in the U.S. Atlantic as well as in Canada (Hayes *et al.,* 2020).

The required mitigation measures are expected to reduce the number and/or severity of proposed takes for all species listed in Table 5, including those with active UMEs, to the level of least practicable adverse impact. In particular they would provide animals the opportunity to move away from the sound source throughout the survey area before HRG survey equipment reaches full energy, thus preventing them from being exposed to sound levels that have the potential to cause injury (Level A harassment) or more severe Level B harassment. No Level A harassment is anticipated, even in the absence of mitigation measures, or proposed for authorization.

NMFS expects that takes would be in the form of short-term Level B behavioral harassment by way of brief startling reactions and/or temporary vacating of the area, or decreased foraging (if such activity was occurring)—reactions that (at the scale and intensity anticipated here) are considered to be of low severity, with no lasting biological consequences. Since both the sources and marine mammals are mobile, animals would only be exposed briefly to a small ensonified area that might result in take. Additionally, required mitigation measures would further reduce exposure to sound that could result in more severe behavioral harassment.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are

not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality or serious injury is anticipated or proposed for authorization;
- No Level A harassment (PTS) is anticipated, even in the absence of mitigation measures, or proposed for authorization;
- Foraging success is not likely to be significantly impacted as effects on species that serve as prey species for marine mammals from the survey are expected to be minimal;
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the planned survey to avoid exposure to sounds from the activity;
- Take is anticipated to be primarily Level B behavioral harassment consisting of brief startling reactions and/or temporary avoidance of the survey area;
- While the survey area is within areas noted as a migratory BIA for North Atlantic right whales, the activities would occur in such a comparatively small area such that any avoidance of the survey area due to activities would not affect migration. In addition, mitigation measures to shutdown at 500 m to minimize potential for Level B behavioral harassment would limit any take of the species; and
- The proposed mitigation measures, including visual monitoring and shutdowns, are expected to minimize potential impacts to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

NMFS proposes to authorize incidental take of 16 marine mammal species (with 17 managed stocks). The total amount of takes proposed for authorization relative to the best available population abundance is less than 22 percent for one stock (bottlenose dolphin northern coastal migratory stock), less than 3 percent for the North Atlantic right whale, and less than 1 percent for all other species and stocks, which NMFS preliminarily finds are small numbers of marine mammals relative to the estimated overall population abundances for those stocks. See Table 5.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS OPR consults internally whenever we propose to authorize take for endangered or threatened species, in this case with NMFS Greater Atlantic Regional Fisheries Office (GARFO).

NMFS OPR is proposing to authorize the incidental take of four species of marine mammals which are listed under the ESA: The North Atlantic right, fin, sei, and sperm whales. NMFS is proposing to authorize take, by Level B harassment only, of NARWs, fin whales, and sei whales which are listed under the ESA. On June 29, 2021 (revised September 2021), GARFO completed an informal programmatic consultation on the effects of certain site assessment and site characterization activities to be carried out to support the siting of offshore wind energy development projects off the U.S. Atlantic coast. Part of the activities considered in the consultation are geophysical surveys such as those proposed by Ocean Wind and for which we are proposing to authorize take. GARFO concluded site assessment surveys (and issuance of associated IHAs) are not likely to adversely affect endangered species or adversely modify or destroy critical habitat. NMFS has determined that issuance of the proposed IHA is covered under the programmatic consultation.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Ocean Wind for conducting marine site characterization surveys off the coast of New Jersey for one year from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed marine site characterization surveys. We also request at this time comment on the potential Renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

• A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

• The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: March 10, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–05477 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB833]

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of SEDAR 74 Pre-Data Workshop Webinar for Gulf of Mexico Red Snapper.

SUMMARY: The SEDAR 74 assessment of Gulf of Mexico red snapper will consist of a Data workshop, a series of assessment webinars, and a Review workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 74 Pre-Data Workshop Webinar will be held on April 1, 2022, from 10 a.m. until 2 p.m. Eastern.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net*.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Pre-Data Workshop Webinar are as follows:

Participants will review data for use in the assessment of Gulf of Mexico red snapper.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 11, 2022.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2022–05518 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB885]

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council's is convening its Scientific and Statistical Committee (SSC) via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Friday April 1, 2022, beginning at 9:30 a.m. Webinar registration information: *https://attendee.gotowebinar.com/register/6149451307975258125.*

Call in information: +1 (415) 655–0060, Access Code: 547–372–805.

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scientific and Statistical Committee will meet to review roles and responsibilities of the SSC as well as SSC work priorities for 2022. They will receive a presentation on the Northeast Fisheries Science Center's (NEFSC) State of the Ecosystem Report and provide the Northeast Fisheries Science Center any recommendations about revisions. They will consider other business as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 6 U.S.C. 1801 *et seq.*

Dated: March 11, 2022.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2022–05520 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Fishery Products Subject to Trade Restrictions Pursuant to Certification Under the High Seas Driftnet Fishing (HSDF) Moratorium Protection Act.

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on November 9, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic & Atmospheric Administration (NOAA), Commerce.

Title: Fishery Products Subject to Trade Restrictions Pursuant to Certification Under the High Seas Driftnet Fishing (HSDF) Moratorium Protection Act.

OMB Control Number: 0648–0651.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 100 respondents annually filing 50 responses each.

Average Hours per Response: 0.167.

Total Annual Burden Hours: 835 hours.

Needs and Uses: National Marine Fisheries Service's Office of International Affairs and Seafood Inspection is requesting an extension of a currently approved information collection.

The information collection involves certification of admissibility for importation of certain fish and fish products that are subject to requirements of the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act) or the Marine Mammal Protection Act (MMPA).

Pursuant to a final rule implementing certain provisions of the Moratorium Protection Act (RIN 0648–BA89), certain fish or fish products of a nation may be subject to import prohibitions. To facilitate enforcement, the National Marine Fisheries Service (NMFS) requires that other fish or fish products from that nation that are not subject to the import prohibitions must be accompanied by documentation of admissibility. A duly authorized official/agent of the applicant's Government must certify that the fish in the shipments being imported into the United States (U.S.) are of a species, or from fisheries, that are not subject to an import restriction. If a nation is identified under the Moratorium Protection Act and fails to receive a positive certification decision from the Secretary of Commerce, products from that nation that are not subject to the import prohibitions must be accompanied by the documentation of admissibility.

Under the Marine Mammal Protection Act, import certification requirements apply in cases where foreign fisheries do not meet U.S. standards for marine mammal bycatch mitigation. A final rule (RIN 0648–AY15) implemented a procedure for making comparability findings for nations that are eligible for exporting fish and fish products to the United States. The nations may receive a comparability finding to export fish and fish products by providing documentation that a nation's bycatch reduction regulatory program is comparable in effectiveness to that of the United States. Fish and fish products from a foreign fishery without a comparability finding are prohibited from entry into U.S. commerce. To facilitate enforcement, NMFS requires that other fish or fish products from that nation that are not subject to the import prohibitions must be accompanied by documentation of admissibility.

The Certification of Admissibility information is used by Customs and Border Protection authorities to determine that inbound seafood shipments are not subject to trade restrictions. NMFS uses the information to ensure compliance with fish product embargos and to assess compliance with international fishery management regulations.

Affected Public: Business or other for-profit organizations.

Frequency: Dependent upon import rate of fish or fish products subject to prohibition(s).

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: 50 CFR part 216; 50 CFR part 300, subpart N.

This information collection request may be viewed at *www.reginfo.gov.*

Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0651.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2022–05522 Filed 3–15–22; 8:45 am]

BILLING CODE 3510–22–P

COUNCIL ON ENVIRONMENTAL QUALITY

[CEQ–2022–0003]

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Council on Environmental Quality.

ACTION: Notice of information collection; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA), the Council on Environmental Quality (CEQ) is planning to submit an information collection request (ICR), Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery to the Office of Management and Budget (OMB) for review and approval. Before doing so, CEQ is soliciting public comments on specific aspects of the proposed information collection as described below. The PRA requires Federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and to allow 60 days for public comment in response to the notice. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Interested persons are invited to submit comments on or before May 16, 2022.

ADDRESSES: You may submit comments, identified by docket number CEQ–2022–0003, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–456–6546.
- *Mail:* Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

All submissions received must include the agency name, ''Council on Environmental Quality,'' and the docket number, CEQ–2022–0003. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information, the disclosure of which is restricted by statute.

FOR FURTHER INFORMATION CONTACT: To request additional information about this Information Collection Request, please contact Sharmila L. Murthy at 202–395–5750 or *Sharmila.L.Murthy@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3506(c)(2)(A), CEQ is soliciting comments and information to enable it to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CEQ, including whether the information will have practical utility; (2) evaluate the accuracy of CEQ's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. CEQ will consider the comments received and amend the ICR as appropriate. CEQ then will submit the final ICR package to OMB for review and approval. At that time, CEQ will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The information collection activity provides a means to garner qualitative stakeholder feedback in an efficient, timely manner. CEQ envisions using surveys and focus groups to enhance customer service, improve product development, target messaging, ensure quality control, engage with stakeholders, and spur innovation. Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically representative results, but rather provide insight about the challenges that subsets of stakeholders face. This feedback will provide insights into stakeholder perceptions, experiences and expectations, provide an understanding of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between CEQ and its stakeholders. It also will allow feedback to contribute directly to the improvement of program management and services. The solicitation of feedback will target areas such as timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. CEQ will assess responses to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from stakeholders on CEQ's services will be unavailable.

CEQ will only submit a collection for approval under this generic clearance if the collections are voluntary; the collections are low burden for respondents and are low- or no-cost for both the respondents and the Federal Government; the collections are noncontroversial and do not raise issues of concern to other Federal agencies; the collections are targeted to the solicitation of opinions from respondents who have experience with a program or may have experience with a program in the near future; personally identifiable information is collected only to the extent necessary and is not retained; information gathered will be used only internally for general service improvement and program management purposes; information gathered will not be used for the purpose of substantially informing influential policy decisions; and information gathered will yield qualitative information.

Title of Collection: CEQ Stakeholder Engagement.

Form Numbers: None.

Respondents/affected entities: Individuals and households; businesses, academic institutions, non-profit groups, and other organizations; or state, Tribal, local, or foreign governments.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 125,000 (over three years).

Frequency of response: Once.

Total estimated burden: 3,000 hours (over three years). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: There are no annualized capital or operation and maintenance costs.

Amy B. Coyle,

Deputy General Counsel.

[FR Doc. 2022–05567 Filed 3–15–22; 8:45 am]

BILLING CODE 3325–F2–P

COUNCIL ON ENVIRONMENTAL QUALITY

[CEQ–2022–0001]

Carbon Capture, Utilization, and Sequestration Guidance

AGENCY: Council on Environmental Quality (CEQ).

ACTION: Notice of availability; request for comments; extension of comment period.

SUMMARY: On February 16, 2022, the Council on Environmental Quality (CEQ) published a notice announcing the availability of and seeking comment on an interim guidance document, ''Carbon Capture, Utilization, and Sequestration Guidance.'' CEQ is extending the comment period on the notice, which was scheduled to close on March 18, 2022, for 31 days until April 18, 2022.

DATES: Comments should be submitted on or before April 18, 2022.

ADDRESSES: You may submit comments, identified by docket number CEQ–2022–0001, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 456–6546.
- *Mail:* Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

Instructions: All submissions received must include the agency name, ''Council on Environmental Quality,'' and docket number, CEQ–2022–0001. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information, the disclosure of which is restricted by statute.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy B. Coyle, Deputy General Counsel, 730 Jackson Place NW, Washington, DC 20503, (202) 395–5750 or *Amy.B.Coyle@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION: On February 16, 2022, CEQ published a notice in the **Federal Register** (87 FR 8808) announcing the availability of and seeking comment on an interim guidance document, ''Carbon Capture, Utilization, and Sequestration Guidance,'' to assist Federal agencies with the regulation and permitting of CCUS activities in the United States. The original deadline to submit comments was March 18, 2022. This action extends the comment period for 31 days to ensure the public has sufficient time to review and comment on the notice. CEQ is making this change in response to public requests for an extension of the comment period. Written comments should be submitted on or before April 18, 2022.

Amy B. Coyle,

Deputy General Counsel.

[FR Doc. 2022–05569 Filed 3–15–22; 8:45 am]

BILLING CODE 3325–F2–P

DEPARTMENT OF EDUCATION

Extension of the Application Deadline Date; Applications for New Awards; Jacob K. Javits Gifted and Talented Students Education Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: On February 16, 2022, the Department of Education (Department) published in the **Federal Register** a notice inviting applications for the fiscal year (FY) 2022 Jacob K. Javits Gifted and Talented Students Education Program (NIA), Assistance Listing Number (ALN) 84.206A. The NIA established a deadline date of April 4, 2022, for the transmittal of applications. This notice extends the deadline date for transmittal of applications until April 11, 2022 and extends the deadline for intergovernmental review until June 10, 2022.

DATES:

Deadline for Transmittal of Applications: April 11, 2022.

Deadline for Intergovernmental Review: June 10, 2022.

FOR FURTHER INFORMATION CONTACT: M. Jeanette Horner-Smith, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E252, Washington, DC 20202–6450. Telephone: (202) 453–6661. Email: *Mildred.Horner-Smith@ed.gov.* Or Jennifer Brianas, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E239, Washington, DC 20202–6450. Telephone: (202) 401–0299. Email: *Jennifer.Brianas@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On February 16, 2022, we published the NIA in the **Federal Register** (87 FR 8812). The NIA established a deadline date of April 4, 2022, for the transmittal of applications. This notice extends the deadline date for transmittal of applications until April 11, 2022, as well as the deadline for intergovernmental review.

We are extending the deadline date for transmittal of applications to allow applicants more time to prepare and submit their applications. On April 4, 2022, the Department is transitioning from use of the Data Universal Numbering System (DUNS) to the Unique Entity Identifier (UEI). To avoid any conflicts with submitting applications during the transition period, we are extending the deadline date for transmittal of applications. Applicants that have submitted applications on or before the original deadline date of April 4, 2022, may resubmit their applications on or before the new application deadline date of April 11, 2022, but are not required to do so. If a new application is not submitted, the Department will use the application that was submitted by the original deadline. If a new application is submitted, the Department will consider the application that was last successfully submitted and received by 11:59:59 p.m., Eastern Time, on April 11, 2022.

Note: All information in the NIA for this competition remains the same, except for the deadline for the transmittal of applications and the deadline for intergovernmental review.

Program Authority: Section 4644 of the ESEA (20 U.S.C. 7294).

Accessible Format: On request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document, the NIA, and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (TXT), a thumb drive, an MP3 file, braille, large print, audiotape, compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal**

Register. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Ruth E. Ryder,

Deputy Assistant Secretary for Policy and Programs Office of Elementary and Secondary Education.

[FR Doc. 2022–05537 Filed 3–15–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2022–FSA–0003]

Privacy Act of 1974; Matching Program

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice of a new Computer Matching Agreement (CMA).

SUMMARY: This document provides notice of a new CMA between the U.S. Department of Education (Department or ED) (recipient agency) and the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) (source agency). The current 18-month CMA was recertified for an additional 12 months on April 21, 2021, and will automatically expire on April 20, 2022.

DATES: Submit your comments on the proposed CMA on or before April 15, 2022.

The CMA will be effective on the later of: (1) April 21, 2022, or (2) 30 days after the publication of this notice on March 16, 2022, unless comments have been received from interested members of the public requiring modification or republication of the notice.

The CMA will continue for 18 months after the effective date of the CMA and may be extended for an additional 12 months thereafter, if the respective Data Integrity Boards (DIBs) of ED and USCIS determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the ''help'' tab.

- *Postal Mail, Commercial Delivery, or Hand Delivery:*

If you mail or deliver your comments about this new CMA, address them to Gerard Duffey, Management and Program Analyst, Wanamaker Building, U.S. Department of Education, Federal Student Aid, 100 Penn Square East, Suite 509.B10, Philadelphia, PA 19107. Telephone: (215) 656–3249.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Gerard Duffey, Management and Program Analyst, Wanamaker Building, U.S. Department of Education, Federal Student Aid, 100 Penn Square East, Suite 509.B10, Philadelphia, PA 19107. Telephone: (215) 656–3249.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 552a (commonly known as the Privacy Act of 1974); Office of Management and Budget (OMB) Final Guidance Interpreting the Provisions of Public Law 100–503; the Computer Matching and Privacy Protection Act of 1988, 54 FR 25818 (June 19, 1989); and OMB Circular A–108, notice is hereby provided of the re-establishment of the matching program between ED and USCIS, prior notice of which was published in the **Federal Register** on September 13, 2019 (84 FR 48333).

Participating Agencies

ED and USCIS.

Authority for Conducting the Matching Program

The information contained in the USCIS database is referred to as the Verification Information System (VIS), which is authorized by section 274A(b) of the Immigration and Nationality Act, 8 U.S.C. 1324a(b). ED seeks access to the VIS for the purpose of confirming the immigration status of applicants for assistance, as authorized by section 484(g) of the HEA, 20 U.S.C. 1091(g), and consistent with the title IV student eligibility requirements of section 484(a)(5) of the HEA, 20 U.S.C. 1091(a)(5). USCIS is authorized to participate in this immigration status verification by section 103 of the Immigration and Nationality Act, 8 U.S.C. 1103.

Purpose(s)

The purpose of this matching program entitled ''DHS–USCIS and the Department of Education Immigration Status Verification'' is to permit ED to confirm the immigration status of alien applicants for, or recipients of, financial assistance under title IV of the Higher Education Act of 1965, as amended (HEA), as authorized by section 484(g) of the HEA (20 U.S.C. 1091(g)). The title IV, HEA programs that are covered by the agreement include: The Federal Pell Grant Program, the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program, the Iraq and Afghanistan Service Grant Program, the Federal Perkins Loan Program, the Federal Work-Study Program, the Federal Supplemental Educational Opportunity Grant Program, and the William D. Ford Federal Direct Loan Program.

Categories of Individuals

The individuals included in this matching program are those who provide an Alien Registration Number (ARN) (also referred to as A-number or USCIS number) when completing the Free Application for Federal Student Aid (FAFSA) and have indicated that they are an ''eligible noncitizen'' to determine their eligibility for title IV, HEA program assistance.

Categories of Records

ED will provide to the DHS the ARN, Social Security number, first and last name, and date of birth of each applicant for financial assistance under title IV of the HEA who indicates that they are an ''eligible noncitizen'' and have provided their ARN in his or her application for financial assistance under title IV of the HEA.

System(s) of Records

ED system of Records: Federal Student Aid Application File (18–11–01), (76 FR 46774). DHS–USCIS system of records: Systematic Alien Verification for Entitlements (SAVE) System of Records, (81 FR 78619).

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2022–05516 Filed 3–15–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0164]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Evaluation of the Implementation of the Statewide Family Engagement Centers

AGENCY: Institute of Educational Science (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before April 15, 2022.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox. Comments may also be sent to *ICDocketmgr@ed.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Andrew Abrams, 202–245–7500.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Evaluation of the Implementation of the Statewide Family Engagement Centers.

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 65.

Total Estimated Number of Annual Burden Hours: 72.

Abstract: Despite the important role family engagement may play in children's educational progress, families below the poverty line are significantly less likely than those at or above the poverty line to be involved in their child's schooling. The Statewide Family Engagement Centers (SFEC) is one of the key U.S. Department of Education programs designed to close this gap. Funded for the first time in 2018, SFEC builds on an earlier program and provides grants to partnerships of education organizations and their states. The partners are expected to both deliver services directly to families to increase their engagement and to provide technical assistance and training to state, district, and school staff to help them help families. This study will describe the work of the first 12 grantees, focusing on the extent to which certain program priorities are being implemented. The results are intended to help federal policy makers refine the goals and objectives of the SFEC program, as well as inform the work of education organizations and state and local education agencies beyond the current grantees to improve their work with families.

Dated: March 11, 2022.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–05548 Filed 3–15–22; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

EAC Federal Financial Report; Survey and Submission to OMB of Proposed Collection of Information

AGENCY: Election Assistance Commission (EAC).

ACTION: Notice; request for comment.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the U.S. Election Assistance Commission (EAC) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the information collection EAC Federal Financial Report (EAC–FFR).

DATES: Comments should be submitted by 5 p.m. EST on Friday, April 15, 2022.

ADDRESSES: To view the proposed EAC–FFR format and instrument, see: *https://www.eac.gov/payments-and-grants/reporting.* For information on the EAC–FFR, contact Kinza Ghaznavi, Office of Grants, Election Assistance Commission, *Grants@eac.gov.* All

requests and submissions should be identified by the title of the information collection.

Written comments and recommendations for the proposed information collection should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: EAC Federal Financial Report; 87 FR 780 (Page 780–781, Document Number 2021–27861)

Purpose

This proposed information collection was previously published in the **Federal Register** on January 6, 2022 and allowed 60 days for public comment. In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act (PRA) of 1995, EAC has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. The purpose of this notice is to allow an additional 30 days for public comment from all interested individuals and organizations.

The EAC Office of Grants Management (EAC/OGM) is responsible for distributing, monitoring, and providing technical assistance to states and grantees on the use of federal funds. EAC/OGM also reports on how the funds are spent to Congress, negotiates indirect cost rates with grantees, and resolves audit findings on the use of HAVA funds.

The EAC–FFR is employed for all financial reports for grants issued under HAVA authority. This revised format builds upon that report for the various grant awards given by EAC. A ''For Comment'' version of the draft format for use in submission of the FFR is posted on the EAC website at: *https://www.eac.gov/payments-and-grants/reporting.* The FFR will directly benefit award recipients by making it easier for them to administer federal grant and cooperative agreement programs through standardization of the types of information required in financial reporting—thereby reducing their administrative effort and costs.

Public Comments

We are soliciting public comments to permit the EAC to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Office of Grants Management.
- Evaluate the accuracy of our estimate of burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

OMB approval is requested for 3 years.

Respondents: All EAC grantees.

Annual Reporting Burden

ANNUAL BURDEN ESTIMATES

EAC grant	Instrument	Total number of respondents	Total number of responses per year	Average burden hours per response	Annual burden hours
251	EAC–FFR	35	2	.5	35
101	EAC–FFR	20	2	.5	20
Election Security	EAC–FFR	56	2	.5	56
Total					111

The estimated cost of the annualized cost of this burden is: $2,523.03, which is calculated by taking the annualized burden (111 hours) and multiplying by an hourly rate of $22.73 (GS–8/Step 5 hourly basic rate).

Amanda Joiner,

Acting General Counsel, U.S. Election Assistance Commission.

[FR Doc. 2022–05573 Filed 3–15–22; 8:45 am]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–681–000.
Applicants: Adelphia Gateway, LLC.
Description: Penalty Revenue Crediting Report of Adelphia Gateway, LLC.
Filed Date: 3/7/22.
Accession Number: 20220307–5287.
Comment Date: 5 p.m. ET 3/21/22.

Docket Numbers: RP22–688–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (Pioneer Apr–Jun 2022) to be effective 4/1/2022.
Filed Date: 3/9/22.
Accession Number: 20220309–5053.
Comment Date: 5 p.m. ET 3/21/22.

Docket Numbers: RP22–689–000.
Applicants: Big Sandy Pipeline, LLC, Bobcat Gas Storage, East Tennessee Natural Gas, LLC, Egan Hub Storage, LLC, Garden Banks Gas Pipeline, LLC, Maritimes & Northeast Pipeline, L.L.C., Mississippi Canyon Gas Pipeline, L.L.C., Moss Bluff Hub, LLC, Nautilus Pipeline Company, L.L.C., NEXUS Gas Transmission, LLC, Sabal Trail Transmission, LLC, Saltville Gas Storage Company L.L.C., Southeast Supply Header, LLC, Steckman Ridge, LP, Texas Eastern Transmission, LP, Algonquin Gas Transmission, LLC.
Description: Compliance filing: Big Sandy Pipeline, LLC submits tariff filing per 154.203: Enbridge (U.S.) Pipelines—LINK System Maintenance—Request for Waivers to be effective N/A.
Filed Date: 3/10/22.
Accession Number: 20220310–5009.
Comment Date: 5 p.m. ET 3/22/22.

Docket Numbers: RP22–690–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Price Indice References to be effective 5/1/2022.
Filed Date: 3/10/22.
Accession Number: 20220310–5012.

Comment Date: 5 p.m. ET 3/22/22.

Docket Numbers: RP22–691–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 3.10.22 Negotiated Rates—Macquarie Energy LLC R–4090–25 to be effective 4/1/2022.

Filed Date: 3/10/22.

Accession Number: 20220310–5016.

Comment Date: 5 p.m. ET 3/22/22.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP13–459–000.

Applicants: Trailblazer Pipeline Company LLC.

Description: Refund Report: TPC 2022–03–09 2021 Penalty Revenues Refund Report to be effective N/A.

Filed Date: 3/9/22.

Accession Number: 20220309–5144.

Comment Date: 5 p.m. ET 3/21/22.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 10, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–05582 Filed 3–15–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD22–3–000]

Review of Cost Submittals by Other Federal for Administering Part I of the Federal Power Act; Notice of Technical Conference

In an order issued on October 8, 2004, the Commission set forth a guideline for Other Federal Agencies (OFAs) to submit their costs related to Administering Part I of the Federal Power Act. *Order On Rehearing Consolidating Administrative Annual Charges Bill Appeals And Modifying Annual Charges Billing Procedures,* 109 FERC ¶ 61,040 (2004) (October 8 Order). The Commission required OFAs to submit their costs using the OFA Cost Submission Form. The October 8 Order also announced that a technical conference would be held for the purpose of reviewing the submitted cost forms and detailed supporting documentation.

The Commission will hold a technical conference, via conference call, at the time identified below. The technical conference will address the accepted costs submitted by the OFAs. The purpose of the conference will be for OFAs and licensees to discuss costs reported in the forms and any other supporting documentation or analyses.

The technical conference will also be transcribed. Those interested in obtaining a copy of the transcript immediately for a fee should contact the Ace-Federal Reporters, Inc., at 202–347–3700, or 1–800–336–6646. Two weeks after the post-forum meeting, the transcript will be available for free on the Commission's e-library system. Anyone without access to the Commission's website or who has questions about the technical conference should contact Raven A. Rodriguez at (202) 502–6276 or via email at *annualcharges@ferc.gov.*

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice), (202) 208–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

Technical Conference Call

Date: Thursday, March 24, 2022.

Time: 2:00 p.m.–3:30 p.m. (EST).

Conference Call-in Information: Webex.

Meeting link: https://ferc.webex.com/ferc/j.php?MTID=mdc1ee2935721b3f8fddf45e3981c609a.

Call-in number: 415–527–5035.

Meeting ID number (access code): 2760 451 1664.

Meeting Password: JJsgkdBh765.

Dated: March 10, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–05585 Filed 3–15–22; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–SFUND–2013–0549; FRL–9665–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Notification of Episodic Releases of Oil and Hazardous Substances (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Notification of Episodic Releases of Oil and Hazardous Substances (EPA ICR Number 1049.15, OMB Control Number 2050–0046) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Public comments were previously requested via the **Federal Register** on September 23, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comment. A fuller description of the ICR is given below including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before April 15, 2022.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–SFUND–2013–0549, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information

(CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Wendy Hoffman, Regulations Implementation Division, Office of Emergency Management, Mail Code 5104A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–8794; email address: *hoffman.wendy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *http://www.regulations.gov.* For further information about the EPA's public docket, Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is 202–566–1744.

Abstract: Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, requires the person in charge of a facility or vessel to immediately notify the National Response Center (NRC) of a hazardous substance release into the environment if the amount of the release equals or exceeds the substance's reportable quantity (RQ) limit. The RQs for the hazardous substance can be found in Table 302.4 of 40 CFR 302.4. Section 311 of the Clean Water Act (CWA) as amended, requires the person in charge of a vessel to immediately notify the NRC of an oil spill into U.S. navigable waters if the spill causes a sheen, violates applicable water quality standards, or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. The reporting of a hazardous substance release that is at or above the substance's RQ allows the federal government to determine whether a federal response action is required to control or mitigate any potential adverse effects to public health or welfare or the environment. Likewise, the reporting of oil spills allows the federal government to determine whether cleaning up the oil spill is required to mitigate or prevent damage to public health or welfare or the environment. The hazardous substance and oil release information collected under CERCLA section 103(a) and CWA section 311 also is available to EPA program offices and other federal agencies that use the information to evaluate the potential need for additional regulations, new permitting requirements for specific substances or sources, or improved emergency response planning.

Release notification information is stored in EPA's WebEOC, a web-based crisis management system which supports response management for significant incidents and daily operations in the Regional Response Centers and EPA's Headquarters Emergency Operations Center. State and local government authorities and the regulated community use release information for purposes of local emergency response planning. The public has access to release information through the Freedom of Information Act. The public may request release information for purposes of maintaining an awareness of what types of releases are occurring in different localities and what actions, if any, are being taken to protect public health and welfare and the environment.

Form Numbers: None.

Respondents/affected entities: Facilities and vessels that may have releases of any hazardous substances or oil at or above its RQ.

Respondent's obligation to respond: Mandatory under CERCLA section 103 (a).

Estimated number of respondents: 19,450.

Frequency of response: As releases occur from a facility or a vessel.

Total estimated burden: 19,839 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $553,337 (per year), which includes no capital or operation and maintenance costs associated with this ICR.

Changes in Estimates: Based on actual NRC release notifications from the previous ICR period, the projected number of annual release notifications in this renewal (19,450) is slightly higher than what EPA projected in the previous ICR (18,447). This resulted in a higher total estimated respondent burden of 19,839 hours for this ICR renewal compared to 18,816 hours in the previous renewal.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05564 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2021–0736; FRL–9659–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Meat and Poultry Products Industry Data Collection

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''Meat and Poultry Products Industry Data Collection'' (EPA ICR No. 2701.01, OMB Control No. 2040–NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a request for approval of a new collection. Public comments were previously requested via the **Federal Register** on November 19, 2021, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information addressed to ten or more entities unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 15, 2022.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OW–2021–0736, online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Stephen Whitlock, Engineering and Analysis Division, Office of Science and Technology, 4303T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–1541; email address: *Whitlock.Steve@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Under the Clean Water Act (CWA), EPA develops effluent limitations guidelines (ELGs) to limit pollutants discharged from industrial point source categories. EPA initially promulgated ELGs for the Meat and Poultry Products (MPP) category in 1974 and amended the regulations in 2004. The current regulation covers wastewater directly discharged by meat and poultry slaughterhouses and further processors as well as independent renderers. Small poultry facilities and indirect dischargers are not included in the current rule.

In EPA's review of nutrients in industrial wastewater, the MPP category ranked among the top two industrial categories discharging nutrients based on 2018 data, and EPA announced a detailed study of the MPP category in 2020. During the study, EPA collected publicly available data and met with industry trade associations. EPA found that there are existing, affordable technologies that can reduce nutrient concentrations in MPP wastewater, and that pretreatment standards may be needed as publicly available data shows pollutants from MPP facilities may passthrough and cause interference for some publicly owned treatment works (POTWs).

Publicly available data on MPP facilities that is needed to support a rulemaking is limited. To identify the base population of approximately 7,000 MPP facilities, EPA collected data from the US Department of Agriculture (USDA) Food Safety Inspection Service (FSIS). Using this base population, EPA attempted to find data on MPP wastewater, effluent limits, and treatment technologies by collecting publicly available facility permits and consulting the Integrated Compliance Information System (ICIS) dataset. Available data was limited to only those facilities directly discharging wastewater or to facilities discharging indirectly through POTWS in individual states that require pretreatment permits to be reported, leaving a large data gap. Thus, a survey of the current MPP industry will be an essential portion of the rulemaking process, necessary for EPA to determine appropriateness of current regulations.

The data collection activities described in this Information Collection Request (ICR) are designed to obtain a robust dataset that characterizes wastewater generation, treatment, and discharge from MPP facilities. A short questionnaire will be administered as an industry census to confirm general information on the type and size (both production and employees) of the facility and gather information on wastewater generation and treatment. To reduce burden on the industry, a statistically representative subset of MPP facilities will complete a detailed survey collecting additional details on processing operations, types and amount of wastewater generated by operation, wastewater treatment details, and economic data. A small number of MPP facilities will also be asked to collect and analyze wastewater samples to characterize raw waste streams, wastewater treatment systems, and treated effluent for pollutants of interest.

The current rule contains 12 subparts, reflecting that the industry engages in a wide range of activities. Facilities range in size from very small (less than 10 employees) to large (over 500 employees). For EPA to complete the detailed technical and economic analysis for the entire industry necessary for the rulemaking process, the short questionnaire, detailed questionnaire, and sampling activities are essential.

Confidential Business Information (CBI) may be collected. In accordance with 40 CFR part 2, subpart B, section 2.203, the MPP Surveys inform respondents of their right to claim information as confidential. Each survey provides instructions for claiming confidentiality and informs respondents of the terms and rules governing the protection of CBI under the CWA and 40 CFR 2.203. Survey respondents are requested to mark any claimed confidential responses as CBI. EPA and its contractors will follow EAD's existing procedures to protect data labeled as CBI.

Form Numbers: 6100–074, 6100–075.

Respondents/affected entities: All Meat and Poultry Products facilities in the U.S.

Respondent's obligation to respond: Mandatory (Clean Water Act section 308).

Estimated number of respondents: 7,000 (total).

Frequency of response: One-time data collection.

Total estimated burden: 70,807 hours. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $3,219,484, which includes $85,708 annualized capital or operation & maintenance costs.

Changes in the Estimates: This is a new data collection request and is a one-time temporary increase to the Agency's burden.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05490 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2017–0652; FRL–9660–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Expanded Access to TSCA Confidential Business Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Expanded Access to Toxic Substances Control Act Confidential Business Information, (EPA ICR Number 2570.02, OMB Control Number 2070–0209) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through March 31, 2022. Public comments were previously requested via the **Federal Register** on August 12, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 15, 2022.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–

HQ–OPPT–2017–0652, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT:

General contact: Katherine Sleasman, Mission Support Division, Office of Program Support, Office of Chemical Safety and Pollution Prevention, (Mailcode: 7101M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 566–1204; email address: *sleasman.katherine@epa.gov.*

Technical contact: Jessica Barkas, Project Management and Operations Division, Office of Pollution Prevention and Toxics, Office of Chemical Safety and Pollution Prevention, (Mailcode: 7408M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 250–8880; email address: *barkas.jessica@epa.gov.*

SUPPLEMENTARY INFORMATION:

Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The Toxic Substances Control Act (TSCA) amendments of June 22, 2016, known as the Frank R. Lautenberg Chemical Safety for the 21st Century Act, expanded the categories of people to whom EPA may disclose TSCA confidential business information (CBI). The amendments authorize EPA to disclose TSCA CBI to state, tribal, and local governments; environmental, health, and medical professionals; and emergency responders, under certain conditions, including consistency with guidance that EPA is required to develop.

Three guidance documents have been developed, corresponding to the new authorities in TSCA section 14(d)(4), (5), and (6). The conditions for access vary under each of the new provisions, but generally include the following: Requesters must show that they have a need for the information related to their employment, professional, or legal duties; recipients of TSCA CBI are prohibited from disclosing or permitting further disclosure of the information to individuals not authorized to receive it (physicians/nurses may disclose the information to their patient); and except in emergency situations EPA must notify the entity that made the CBI claim at least 15 days prior to disclosing the CBI. In addition, under these new provisions, requesters (except in some emergency situations) are required to sign an agreement and may be required to submit a statement of need to EPA. In accordance with the requirements of TSCA section 14(c)(4)(B), the guidance documents cover the content and form of the agreements and statements required under each provision and include information on where and how to submit requests to EPA.

Form numbers: Not applicable.

Respondents/affected entities: Respondents affected by this activity are mainly government employees (federal, state, local, tribal), as well as medical professionals, such as doctors and nurses.

Respondent's obligation to respond: Voluntary.

Frequency of response: On occasion.

Estimated number of respondents: 6 (total).

Total estimated burden: 89 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $5,873.98 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the estimates: There is an increase in the estimated burden costs compared with that currently approved by OMB. The increase in the respondent burden and agency costs were caused by an increase in the hourly wages and a change in the methodology to calculate loaded wages (wages plus fringe benefits and overhead). The change in the estimated number of respondents is based on EPA experience. The changes, which are discussed in more detail in the ICR, qualify as an adjustment.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05507 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA R9–2021–06; FRL–9441–01–R9]

Notice of Proposed Administrative Settlement Agreement for Removal Action and Payment of Response Costs by Prospective Lessee at the C-Brite Removal Site in Harbor City; Los Angeles County, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given that the Environmental Protection Agency (EPA), has entered into a proposed settlement, embodied in an Administrative Settlement Agreement for Removal Action and Payment of Response Costs by Prospective Lessee (''Settlement Agreement''), with 1213 253rd, LLC (''Prospective Lessee''), a prospective lessee and purchaser of the real property located at 1213 253rd Street, Harbor City, Los Angeles County, California, known as the Former C-Brite Metal Finishing Facility Site (''C-Brite Site'' or ''Site''). C-Brite Metal Finishing, Inc. operated a plating business at the Site from 1966 to 2017 and abandoned the property thereafter. Under the Settlement Agreement, the Prospective Lessee agrees to perform a portion of the removal work at the Site and to pay $80,000 for EPA's oversight costs in exchange for liability protection, contribution protection, a release of any lien on the Site under CERCLA Section 107(r) or 107(l), and a covenant not to sue for existing contamination at the Site, the payment of EPA's oversight costs, or the removal work. EPA completed the removal of hazardous contamination at the site, and the Lessee will now continue with the removal of all the remaining non-hazardous debris.

DATES: The Agency will consider public comments relating to the Settlement Agreement until April 15, 2022. EPA will consider all comments received and may modify or withdraw its consent to the Settlement Agreement if comments received disclose facts or considerations

that indicate it is inappropriate, improper, or inadequate.

ADDRESSES: Please contact Craig Whitenack at *Whitenack.Craig@epa.gov* or (213) 244–1820 to request a copy of the Settlement Agreement. Comments on the Settlement Agreement should be submitted in writing to Mr. Whitenack at *Whitenack.Craig@epa.gov.* Comments should reference the C-Brite Site and the EPA Docket Number for the Settlement Agreement, EPA R9–2021–06. If for any reason you are not able to submit a comment by email, please contact Mr. Whitenack at (213) 244–1820 to make alternative arrangements for submitting your comment. EPA's response to comments received may be obtained by contacting Mr. Whitenack at *Whitenack.Craig@epa.gov* or (213) 244–1820.

FOR FURTHER INFORMATION CONTACT: Craig Whitenack, Civil Investigator, Superfund Division, U.S. EPA Region IX, 600 Wilshire Blvd., Suite 1460, Los Angeles, CA 90017; email: *Whitenack.Craig@epa.gov;* phone: (213) 244–1820.

Dated: March 9, 2022.

Michael Montgomery,

Director, Superfund and Emergency Management Division, EPA Region IX.

[FR Doc. 2022–05488 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2015–0553; FRL–9663–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; CEQ–EPA Presidential Innovation Award for Environmental Educators and the President's Environmental Youth Awards Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), CEQ–EPA Presidential Innovation Award for Environmental Educators and the President's Environmental Youth Awards Application (EPA ICR Number 2524.03, OMB Control Number 2090–0031) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through April 30, 2022. Public comments were previously requested via the **Federal Register** on October 18, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 15, 2022.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OA–2015–0553, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Javier Araujo, Office of the Administrator, Office of Environmental Education, MC–1704A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–2642; fax number: 202–564–2753; email address: *araujo.javier@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The purpose of this information collection request is to collect information from applicants to select recipients for the Presidential Innovation Award for Environmental Educators (PIAEE) program and the President's Environmental Youth Awards (PEYA) program. The U.S. Environmental Protection Agency (EPA or the Agency), in conjunction with the White House Council on Environmental Quality (CEQ), established the PIAEE program to meet the requirements of Section 8(e) of the National Environmental Education Act (20 U.S.C. 5507(e)). The Agency established the PEYA program to meet the requirements of Section 8(d) of the National Environmental Education Act (20 U.S.C. 5507(d)).

Form Numbers: 5900–578, 6500–04.

Respondents/affected entities: K–12 teachers who teach on a full-time basis in a public school that is operated by a local education agency, including schools funded by the Bureau of Indian Affairs. For this program, a local education agency is one as defined by section 198 of the Elementary and Secondary Education Act of 1965 (now codified at 20 U.S.C. 7801(26)).

Respondent's obligation to respond: Required to obtain information from the applicants for PIAEE and PEYA program and assess certain aspects of programs as established under Section 8(e) of the National Environmental Education Act (20 U.S.C. 5507(e)) and Section 8(d) of the National Environmental Education Act (20 U.S.C. 5507(d)) respectively.

Estimated number of respondents: 75 (total per year) for the PIAEE program and 250 (total per year) for the PEYA program.

Frequency of response: Annually.

Total estimated burden: 3,225 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $116,888 per year, includes $0 capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 2,475 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to the addition of the PEYA application. The individual cost per respondent for internal processing has also risen, due to increases in labor rate estimates.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05509 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2021–0094; FRL–9662–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Acetal Resin; Acrylic and Modacrylic Fiber; Hydrogen Fluoride and Polycarbonate Production (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards for Acetal Resin; Acrylic and Modacrylic Fiber; Hydrogen Fluoride and Polycarbonate Production (EPA ICR Number 1871.11, OMB Control Number 2060–0420), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through April 30, 2022. Public comments were previously requested, via the **Federal Register** (86 FR 19256), on April 13, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 15, 2022.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2021–0094, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0833; email address: *ali.muntasir@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov,* or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The New Source Performance Standards (NSPS) for Generic Maximum Achievable Control Technology Standards for Acetal Resin; Acrylic and Modacrylic Fiber; Hydrogen Fluoride and Polycarbonate Production were proposed on October 14, 2998; and promulgated on June 29, 1999; and amended on: November 22, 1999; November 2, 2001; June 7, 2002; July 12, 2002; and October 8, 2014. These regulations apply to new and existing facilities of the following four categories: Polycarbonates (PC) Production, Acrylic and Modacrylic Fibers (AMF) Production, Acetal Resins (AR) Production, and Hydrogen Fluoride (HF) Production. New facilities include those that commenced construction or reconstruction after the date of proposal. In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. This information is being collected to assure compliance with 40 CFR part 63, subpart YY.

Form Numbers: None.

Respondents/affected entities: Facilities that produce polycarbonates, acrylic and modacrylic fibers, acetal resins, and hydrogen fluoride.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart YY).

Estimated number of respondents: 7 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 2,910 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $388,000 (per year), which includes $43,900 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is no change in burden from the most-recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for this industry is very low or non-existent, so there is no significant change in the overall burden. Since there are no changes in the regulatory requirements and there is no significant industry growth, there are also no significant changes in the capital/startup or operation and maintenance (O&M) costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05508 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA R9–2021–07; FRL–9389–01–R9]

CERCLA Cashout Settlement Agreement for the C-Brite Removal Site in Harbor City; Los Angeles County, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given that the Environmental Protection Agency (EPA), has entered into a proposed settlement, embodied in a Cashout Settlement Agreement for Ability to Pay Peripheral Parties (''Settlement Agreement''), with the Laffey Family Trust, dated August 6, 2001 (and amended January 24, 2013), and Virginia Laffey (collectively, ''Settling

Parties''), owners of the real property located at 1213 253rd Street, Harbor City, Los Angeles County, California, known as the Former C-Brite Metal Finishing Facility Site (''C-Brite Site'' or ''Site''). C-Brite Metal Finishing, Inc. operated a plating business at the Site from 1966 to 2017 and abandoned the property thereafter. Under the Settlement Agreement, the Settling Parties' CERCLA liability will be resolved in exchange for a lump sum payment of $100,000, which will be placed in a special account and used to fund response actions at the Site.

DATES: The Agency will consider public comments relating to the Settlement Agreement until April 15, 2022. EPA will consider all comments received and may modify or withdraw its consent to the Settlement Agreement if comments received disclose facts or considerations that indicate it is inappropriate, improper, or inadequate.

ADDRESSES: Please contact Harry Allen at *Allen.HarryL@epa.gov* or (415) 218–7406 to request a copy of the Settlement Agreement. Comments on the Settlement Agreement should be submitted in writing to Mr. Allen at *Allen.HarryL@epa.gov.* Comments should reference the C-Brite Site and the EPA Docket Number for the Settlement Agreement, EPA R9–2021–07. If for any reason you are not able to submit a comment by email, please contact Mr. Allen at (415) 218–7406 to make alternative arrangements for submitting your comment. EPA's response to comments received may be obtained by contacting Mr. Allen at *Allen.HarryL@epa.gov* or (415) 218–7406.

FOR FURTHER INFORMATION CONTACT: Harry Allen, On-Scene Coordinator (SFD–9–2), Superfund Division, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105; email: *Allen.HarryL@epa.gov;* phone: (415) 218–7406.

Dated: March 9, 2022.

Michael Montgomery,

Director, Superfund and Emergency Management Division, EPA Region IX.

[FR Doc. 2022–05489 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2022–0293; FRL–9653–01–OGC]

Proposed Settlement Agreement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with the Clean Air Act, as amended (CAA or the Act), notice is given of a proposed settlement agreement in *Genscape, Inc.* v. *EPA,* No. 19–3705 (6th Cir.). On July 26, 2019, Petitioner Genscape, Inc. (Genscape) filed a petition for review in the United States Court of Appeals for the Sixth Circuit. Genscape challenged the final action of the Environmental Protection Agency (EPA or the Agency) entitled ''EPA Final Determination in the Matter of Genscape, Inc., Option A Quality Assurance Plan Auditor Under the Renewable Fuel Standard Program'' (''Final Determination''), which was issued on May 31, 2019. The proposed settlement agreement would require dismissal of the litigation once EPA issues a revision to the Final Determination as specified in Attachment A.

DATES: Written comments on the proposed settlement agreement must be received by *April 15, 2022.*

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2022–0293, online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Additional Information about Commenting on the Proposed Settlement Agreement'' heading under the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov,* as there may be a delay in processing mail and faxes. Hand-deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

FOR FURTHER INFORMATION CONTACT: Susan Stahle, Air and Radiation Law Office (mail code), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone (202) 564–1272; email address *stahle.susan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Settlement Agreement

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2022–0293) contains a copy of the proposed settlement agreement.

The electronic version of the public docket for this action contains a copy of the proposed settlement agreement and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

II. Additional Information About the Proposed Settlement Agreement

On May 31, 2019, EPA issued the Final Determination in which it (1) revoked Genscape's registration as a Quality Assurance Plan (QAP) auditor pursuant to 40 CFR 80.1450(g)(11); (2) revoked Genscape's QAP A Plan under 40 CFR 80.1469(e)(4); and (3) required Genscape to replace the remaining invalid A–RINs it had verified and that were used for compliance purposes pursuant to 40 CFR 80.1470(d) and 80.1474(b)(5)(i). On July 26, 2019, Genscape filed a petition for review in the Sixth Circuit Court of Appeals challenging only the portion of the Final Determination requiring Genscape to replace the invalid RINs. The proposed settlement would require dismissal of this litigation once EPA issues a revision to the Final Determination as specified in Attachment A within 30 days of a fully executed settlement agreement. The revision to the Final Determination would be limited to revisions addressing the number of RINs Genscape must replace, the time in which they much be replaced and other requirements regarding that RIN replacement. Genscape would file an appropriate pleading to dismiss its petition for review with prejudice

within 15 days of EPA issuing the revision to the Final Determination.

If Genscape fully complies with the revised Final Determination, it would fulfill Genscape's RIN replacement obligations under and bring Genscape into compliance with 40 CFR 80.1470 and 80.1474 regarding the auditing activities described in the Final Determination and would fully resolve all RIN retirement obligations of Genscape and its parent companies identified in the proposed settlement agreement arising from the Final Determination. If Genscape fails to comply with any requirement in the revised Final Determination, EPA would reserve the right to initiate proceedings to enforce that action. If EPA fails to issue the revisions to the Final Determination, Genscape would be able to pursue its challenge to the original Final Determination.

In accordance with section 113(g) of the CAA, for a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed settlement agreement. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

III. Additional Information About Commenting on the Proposed Settlement Agreement

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2022–0293, via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

Gautam Srinivasan,

Associate General Counsel.

[FR Doc. 2022–05486 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2021–0125; FRL–9664–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Polyvinyl Chloride and Copolymers Production (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NESHAP for Polyvinyl Chloride and Copolymers Production (EPA ICR Number 2432.06, OMB Control Number 2020–0666), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through April 30, 2022. Public comments were previously requested, via the **Federal Register**, on April 13, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 15, 2022.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2021–0125, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0833; email address: *ali.muntasir@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the

public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov,* or in person, at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Polyvinyl Chloride and Copolymers Production (40 CFR part 63, subpart HHHHHHH) apply to both existing and new PVC production facilities. Area source PVC facilities are subject to 40 CFR part 63, subpart DDDDDD and not covered in this ICR. New facilities include those that either commenced construction or reconstruction after the date of proposal. In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NESHAP. This information is being collected to assure compliance with 40 CFR part 63, subpart HHHHHHH.

Form Numbers: None.

Respondents/affected entities: Polyvinyl chloride and copolymer production facilities that are major sources of HAP.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart HHHHHHH).

Estimated number of respondents: 13 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 318,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $44,700,000 (per year), which includes $7,140,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: The decrease in burden from the most-recently approved ICR is due to four adjustments. There is an adjustment decrease in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. The adjustment decrease in burden from the most-recently approved ICR is due to a decrease in the number of respondents. The most-recently approved ICR estimated 15 major source facilities. The Wacker-Calvert City facility has ceased PVC operations. Although the previous ICR considered the Formosa—Point Comfort operations to be two facilities, this ICR more appropriately considers these operations as a single respondent, due to shared equipment, controls, and/or employees. Therefore, this ICR renewal considers there to be 13 major source facilities. The adjustment decrease is also due to a correction to the number of hours needed for existing respondents to refamiliarize with rule requirements each year.

The adjustment decrease is also offset by corrections to burden estimates for resin sampling, PRD electronic monitor review, gasholders, storage vessels, and ongoing inspections of bypasses, and to the number of occurrences per year for recordkeeping requirements to more accurately reflect facility activities.

There is an increase in the operation and maintenance (O&M) costs, as calculated in section 6(b)(iii), compared with the costs in the previous ICR. Although the number of respondents with O&M decreased, corrections were made to the annual O&M costs for VC ambient monitoring, uncontrolled wastewater testing, and uncontrolled wastewater Non-VC TOHAP testing to more accurately reflect both the number of monitors per facility and the number of waste streams sampled per facility.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05510 Filed 3–15–22; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Privacy Act of 1974; System of Records

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Notice of a modified system of records.

SUMMARY: To fulfill its conflict resolution and training mission, Federal Mediation and Conciliation Service (FMCS) uses Microsoft SharePoint, Microsoft Outlook, and a case records management system new to FMCS to enable mediators and managers to manage cases, manage reporting requirements, provide data for research and training, store recorded trainings and meetings, and collect information on Agency operations. The Agency's internal drives, SharePoint, Outlook, Cloud-based services such as *Zoom.gov* and Microsoft Teams, and a case records management system are used to store electronic case tracking information, electronic case files (including mediation agreements), and recorded meetings and trainings, permitting the accurate and timely collection, retrieval, and retention of information maintained by offices of the Agency. Inter-Agency Agreements (IAA), agreements for reimbursable services, and requests for mediation and training are also stored in these locations. IAAs and agreements for reimbursable services allow FMCS to provide requested services, such as training and labor dispute resolution, to other federal agencies. The notice amendment includes administrative updates to refine details published under summary, dates, supplementary information, system name, system location, authority for maintenance of the system, purpose of the system, categories of individuals covered by the system, categories of records in the system, record source categories, routine uses, policies and practices for storage of records, policies and practices for retrieval of records, policies and practices for retention and disposal of records, administrative safeguards, record access procedures, and contesting records procedures. These sections are amended to refine previously published information about the system of records. The addresses, for further information contact, security classification, system location, system manager, notification procedures, exemptions promulgated, and history remain unchanged. This amended SORN deletes and supersedes the SORN published in the **Federal Register** on September 21, 2021.

DATES: This system of records will be effective without further notice on April 15, 2022 unless otherwise revised pursuant to comments received. New routine uses will be effective on April 15, 2022. Comments must be received on or before April 15, 2022.

ADDRESSES: You may send comments, identified by FMCS–0004 by any of the following methods:

- *Mail:* Office of General Counsel, 250 E Street SW, Washington, DC 20427.
- *Email: register@fmcs.gov.* Include FMCS–0004 on the subject line of the message.
- *Fax:* (202) 606–5444.

FOR FURTHER INFORMATION CONTACT: Anna Davis, Acting General Counsel, at *adavis@fmcs.gov* or 202–606–3737.

SUPPLEMENTARY INFORMATION: The notice amendment includes administrative updates to refine details published under summary, dates, supplementary information, system name, system location, authority for maintenance of

the system, purpose of the system, categories of individuals covered by the system, categories of records in the system, record source categories, routine uses, policies and practices for storage of records, policies and practices for retrieval of records, policies and practices for retention and disposal of records, administrative safeguards, record access procedures, contesting records procedures, and history. These sections are amended to refine previously published information about the system of records. The addresses, for further information contact, security classification, system location, system manager, notification procedures, and exemptions promulgated remain unchanged.

This system is needed for processing, storing, and maintaining FMCS case records, notices, and agreements.

SYSTEM NAME AND NUMBER:

FMCS–0004 Case Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Federal Mediation and Conciliation Service, 250 E Street SW, Washington, DC 20427. For records stored on Zoom, this system is located at 55 Almaden Blvd., Suite 600, San Jose, CA 95113.

SYSTEM MANAGER(S):

Doug Jones, Director of Information Technology, email *djones@fmcs.gov,* or send mail to Federal Mediation and Conciliation Service, 250 E Street Southwest, Washington, DC 20427, Attn: Doug Jones.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Mediation and Conciliation Service, 29 U.S.C. 172, *et seq.;* The National Labor Relations Act, 29 U.S.C. 151, *et seq.;* Administrative Dispute Resolution Act, 5 U.S.C. 571–584; Negotiated Rulemaking Act of 1990, 5 U.S.C. 561–570; the Federal Labor Relations Act, 5 U.S.C. 7119.

PURPOSE(S) OF THE SYSTEM:

The records in this system are used to process, track, review, and evaluate requests for mediation, training, and other alternate dispute resolution services. Records from this system may be used for training, presentation, and research purposes. The records from this system will also be used in the preparation of internal agency reports, the agency's budget requests, and reports to Congress.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

FMCS clients who request or receive FMCS services concerning conflict management services or training. These FMCS clients include representatives from employers, unions, and educational institutions.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Requests for mediation or training completed by parties to include the Agency Form F–7, available on *www.fmcs.gov.* Information collected on the form includes contact information for parties requesting services.

(2) Case processing documents and documents sent to or from parties to a mediation: Agency confirmation letters sent to parties assigning mediators to cases or trainings, mediation agreements, ethics documents concerning mediator involvement and authorizations to participate, and reports and invoices regarding mediations and training.

RECORD SOURCE CATEGORIES:

FMCS clients who are parties to labor agreements/disputes, mediations, or those requesting FMCS services submit notices and requests to FMCS. FMCS personnel create reports, status updates, and other internal processing records based on case progress and management.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FMCS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

(a) To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule regulation or order where the record, either alone or in conjunction with other information creates an indication of a violation or potential violation of civil or criminal laws or regulations.

(b) To disclose information to contractors, grantees, experts, consultants, detailees, and other non-Government employees performing or working on a contract, service, or other assignment for the agency when necessary to accompany an agency function related to this system of records.

(c) To officials of labor organizations recognized under 5 U.S.C. chapter 71 upon receipt of a formal request and in accordance with the conditions of 5 U.S.C. 7114 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

(d) To disclose information to a Member of Congress or a congressional office in response to an inquiry made on behalf of, and at the request of, an individual who is the subject of the record.

(e) In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when FMCS or other Agency representing FMCS determines the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

(f) To the Department of Justice, including Offices of the U.S. Attorneys, or another Federal agency representing FMCS in pending or potential litigation or proceedings before any court, adjudicative, or administrative body. Such disclosure is permitted only when it is relevant and necessary to the litigation or proceeding, and one of the following is a party to the litigation or has an interest in such litigation:

(1) FMCS, or any component thereof;

(2) Any employee or former employee of FMCS in their official capacity;

(3) Any employee or former employee of FMCS in their capacity where the Department of Justice or FMCS has agreed to represent the employee;

(4) The United States, a Federal agency, or another party in litigation before a court, adjudicative, or administrative body, upon the FMCS General Counsel's approval, pursuant to 5 CFR part 295 or otherwise.

(g) To any agency, organization, or person for the purposes of performing audit or oversight operations related to the operation of this system of records or for federal ethics compliance purposes as authorized by law, but only information necessary and relevant to such audit or oversight function.

(h) To disclose data or information to other federal agencies, educational institutions, or FMCS clients who collaborate with FMCS to provide research or statistical information, services, or training concerning conflict management.

(i) To appropriate agencies, entities, and persons when (1) FMCS suspects or has confirmed that there has been a breach of the system of records, (2) FMCS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, FMCS (including its information systems,

programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with FMCS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(j) To another Federal agency or Federal entity, when FMCS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Case records may be received in hardcopy form from FMCS clients. Hardcopy forms are then scanned and stored electronically on FMCS servers. Meetings and trainings that are recorded via *Zoom.gov* are stored in the Cloud on ZoomGov servers requiring a username and password. Meetings recorded in Microsoft Teams are stored on the FMCS employee's OneDrive which requires a username and password. Third-party recording of meetings or trainings on FMCS platforms is not permitted.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

In order to retrieve records, FMCS personnel may search by the name of the representative or party, the assigned case number, the date, location, type of service provided, or FMCS personnel.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All case records are retained and disposed of in accordance with General Records Schedule 1.1 and 4.2, issued by the National Archives and Records Administration (NARA).

ADMINSTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Case records and agreements are accessible to restricted FMCS personnel or contractors who require access. Access to these electronic records occurs through a web browser to the internet or on the agency's internal drives both requiring a username and password for login. FMCS buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. The case records management system will store records electronically using a commercial software application run on the Customer Relationship Management (CRM) platform, Microsoft Dynamics, which require a username and password. SharePoint is used to store the IAAs, which requires a username and password. Temporary paper files, notices received through mail, are destroyed once they are scanned into the agency's internal drives which also require a username and password.

RECORD ACCESS PROCEDURES:

Individuals must provide the following information for their records to be located and identified: (1) Full name, (2) Address, and (3) A reasonably identifying description of the record content requested. Requests can be submitted via *fmcs.gov/foia/,* via email to *privacy@fmcs.gov,* or via mail to the Privacy Office at FMCS 250 E Street SW, Washington, DC 20427. See 29 CFR 1410.3.

CONTESTING RECORDS PROCEDURES:

Requests for correction or amendment of records, on how to contest the content of any records. Privacy Act requests to amend or correct records may be submitted to the Privacy Office at *privacy@fmcs.gov* or via mail to the Privacy Office at FMCS 250 E Street SW, Washington, DC 20427. Also, see *https://www.fmcs.gov/privacy-policy/.* See 29 CFR 1410.6.

NOTIFICATION PROCEDURES:

See 29 CFR 1410.3(a), Individual access requests.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

This amended SORN deletes and supersedes the SORN published in the **Federal Register** on September 21, 2021, at 86 FR 52467.

Dated: March 11, 2022.

Sarah Cudahy,

Senior Advisor, Federal Mediation and Conciliation Service.

[FR Doc. 2022–05544 Filed 3–15–22; 8:45 am]

BILLING CODE 6732–01–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Notice of Stakeholder Surveys for Facilitation and Other Purposes

AGENCY: Federal Mediation and Conciliation Service (FMCS).

ACTION: 60-Day notice and request for comments.

SUMMARY: FMCS invites the general public and other Federal Agencies to take this opportunity to comment on the surveys and other information FMCS will collect to inform the process and participants for its conflict prevention, management, and resolution services provided to Federal Agencies, particularly public policy mediations and facilitations that include participants external to the federal government.

DATES: Comments must be submitted on or before May 16, 2022.

ADDRESSES: You may submit comments through one of the following methods:

- *Email: register@fmcs.gov.*
- *Mail:* Stakeholder Survey Comments c/o Sarah Cudahy, One Independence Square, 250 E. St. SW, Washington, DC 20427. Please note that at this time, mail is sometimes delayed. Therefore, we encourage emailed comments.

FOR FURTHER INFORMATION CONTACT: Sarah Cudahy, 202–606–8090, *register@fmcs.gov.*

SUPPLEMENTARY INFORMATION: Copies of the proposed questions are available below. Paper copies are available by emailing *register@fmcs.gov.* Please ask for the Stakeholder Survey.

I. Information Collection Request

Agency: Federal Mediation and Conciliation Service.

Form Number: Not yet assigned.

Type of Request: New collection; generic clearance.

Affected Entities: Private sector; state, local, and tribal governments; individuals or households; and federal government.

Frequency: These methods of engagement are utilized on an as-needed basis. Each engagement is completed once.

Abstract: Pursuant to the Administrative Dispute Resolution Acts of 1990 and 1996, 5 U.S.C. 561 *et seq.* and 571 *et seq.,* and 29 U.S.C. 173(f), the Federal Mediation and Conciliation Service provides conflict prevention, management, and resolution services, including, but not limited to, public policy facilitation and mediation services, to Federal agencies. As part of these services, sometimes FMCS employees need to survey or ask questions to determine the best process and participants to prevent, manage, or resolve the issue, particularly for public policy mediations, public policy or environmental facilitations, or negotiated rulemaking. To do so, FMCS has created a set of questions to ask various stakeholders about issues, concerns, engagement, and appropriate

stakeholders relevant to the issues. The survey format will differ depending on the project, but may be conducted in one or more of the following ways, both in-person and virtually: Individual or group interviews, individual or group discussions, or written surveys. The survey requests information such as stakeholder understanding of the particular issue, stakeholder interests in the particular issue, appropriate stakeholders, methods of engagement with the issue, and other similar information that will allow FMCS to best create a successful process. A link to the survey is found here: *https://tags.fmcs.gov/4DAction/FC/DoAsynchTop?Fedreg*UPPJ*919/10300.* To log in, go to: *https://tags.fmcs.gov/,* use user name ''Fedreg'' and password ''UPPJ.'' The collection of such information is critical for ensuring the appropriate process, stakeholders, and stakeholder input in the process. No other collections are being conducted that would provide this information to FMCS.

Burden: The current total annual burden estimate is that FMCS will receive information from approximately 15,000 respondents per year. Interviews and discussions would be approximately thirty minutes in duration. Written surveys would take approximately ten minutes to complete. FMCS expects the total burden to not exceed 2,535 hours per year.

II. Request for Comments

FMCS solicits comments to:

i. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

ii. Enhance the accuracy of the agency's estimates of the burden of the proposed collection of information.

iii. Enhance the quality, utility, and clarity of the information to be collected.

iv. Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic collection technologies or other forms of information technology.

III. The Official Record

The official records are electronic records.

List of Subjects

Information Collection Requests.

Dated: March 11, 2022.

Sarah Cudahy,

Senior Advisor, Federal Mediation and Conciliation Service.

[FR Doc. 2022–05543 Filed 3–15–22; 8:45 am]

BILLING CODE 6732–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2436–N]

RIN 0938–ZB62

Medicaid Program; Final FY 2018, Final FY 2019, Preliminary FY 2020, and Preliminary FY 2021 Disproportionate Share Hospital Allotments, and Final FY 2018, Final FY 2019, Preliminary FY 2020, and Preliminary FY 2021 Institutions for Mental Diseases Disproportionate Share Hospital Limits

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces the final Federal share (FS) disproportionate share hospital (DSH) allotments for Federal fiscal year (FY) 2018 and FY 2019, and the preliminary FS DSH allotments for FY 2020 and FY 2021. This notice also announces the final FY 2018 and FY 2019 and the preliminary FY 2020 and FY 2021 limitations on aggregate DSH payments that States may make to institutions for mental disease and other mental health facilities. In addition, this notice includes background information describing the methodology for determining the amounts of States' FY DSH allotments.

DATES: The allotments announced in this notice are effective April 15, 2022. The final allotments and limitations set forth in this notice are applicable for the fiscal years specified.

FOR FURTHER INFORMATION CONTACT: Stuart Goldstein, (410) 786–0694 and Richard Cuno, (410) 786–1111.

SUPPLEMENTARY INFORMATION:

I. Background

A. Fiscal Year DSH Allotments

A State's Federal fiscal year (FY) disproportionate share hospital (DSH) allotment represents the aggregate limit on the Federal share (FS) amount of the State's DSH payments to DSH hospitals in the State for the FY. The amount of such allotment is determined in accordance with the provisions of section 1923(f) of the Social Security Act (the Act), with some State-specific exceptions as specified in section 1923(f) of the Act. Under such provisions, in general, a State's FY DSH allotment is calculated by increasing the amount of its DSH allotment for the preceding FY by the percentage change in the Consumer Price Index for all Urban Consumers (CPI–U) for the previous FY.

The Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (collectively, the Affordable Care Act), amended Medicaid DSH provisions, adding section 1923(f)(7) of the Act. Section 1923(f)(7) of the Act would have required reductions to States' FY DSH allotments from FY 2014 through FY 2020, the calculation of which was described in the Disproportionate Share Hospital Payment Reduction final rule published in the September 18, 2013 **Federal Register** (78 FR 57293). Subsequent legislation, most recently the Consolidated Appropriations Act, 2021 (Pub. L. 116–260, enacted December 27, 2020), delayed the start of these reductions until FY 2024. The final rule delineating a revised methodology for the calculation of DSH allotment reductions beginning in 2020 (subsequently delayed by further statutory enactment) was published in the September 25, 2019 **Federal Register** (84 FR 50308).

Because there are no reductions to DSH allotments for FY 2018 through FY 2023 under section 1923(f)(7) of the Act, as amended, this notice contains only the State-specific final FY 2018 and FY 2019 DSH allotments and preliminary FY 2020 and FY 2021 DSH allotments, as calculated under the statute without application of the reductions that would have been imposed beginning as early as FY 2014 under prior versions of section 1923(f)(7) of the Act. This notice also provides information on the calculation of the FY DSH allotments, the calculation of the States' institution for mental diseases (IMD) DSH limits, and the amounts of States' final FY 2018 and FY 2019 IMD DSH limits and preliminary FY 2020 and FY 2021 IMD DSH limits.

B. Determination of Fiscal Year DSH Allotments

Generally, in accordance with the methodology specified under section 1923(f)(3) of the Act, a State's FY DSH allotment is calculated by increasing the amount of its DSH allotment for the preceding FY by the percentage change in the CPI–U for the previous FY. Also, in accordance with section 1923(f)(3) of

the Act, a State's DSH allotment for a FY is subject to the limitation that an increase to a State's DSH allotment for a FY cannot result in the DSH allotment exceeding the greater of the State's DSH allotment for the previous FY or 12 percent of the State's total medical assistance expenditures for the allotment year (this is referred to as the 12 percent limit).

Furthermore, under section 1923(h) of the Act, Federal financial participation (FFP) for DSH payments to IMDs and other mental health facilities is limited to State-specific aggregate amounts. Under this provision, the aggregate limit for DSH payments to IMDs and other mental health facilities is the lesser of a State's FY 1995 total computable (State and FS) IMD and other mental health facility DSH expenditures applicable to the State's FY 1995 DSH allotment (as reported on the Form CMS–64 as of January 1, 1997), or the amount equal to the product of the State's current year total computable DSH allotment and the applicable percentage specified in section 1923(h) of the Act.

C. Determination of Fiscal Year DSH Allotments for FY 2020 and FY 2021

The Families First Coronavirus Response Act's (FFCRA) (Pub. L. 116–127, enacted March 18, 2020) temporary Federal medical assistance percentage (FMAP) increase of 6.2 percentage points went into effect on January 1, 2020 for eligible States, as provided in section 6008 of the FFCRA. As relevant to this notice, this FMAP increase applies to eligible Medicaid expenditures including DSH payments for FY 2020 (with the exception of the 1st quarter, from October 1, 2019 through December 31, 2019), and FY 2021, and all States currently are receiving the temporary FFCRA FMAP increase. For States that exhaust their entire DSH allotment, the FFCRA FMAP increase would effectively reduce the amount of total computable (TC) DSH payments that such States could pay to qualifying providers.

To avoid this reduction in TC DSH allotments, section 9819 of the American Rescue Plan Act of 2021 (ARP) (Pub. L. 117–2, enacted March 11, 2021) added section 1923(f)(3)(F) of the Act, adjusting FS DSH allotments during periods when and for States where the temporary 6.2 percentage point FMAP increase under section 6008 of the FFCRA is in effect. As directed by the ARP, we are required to recalculate FS DSH allotments to an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA FMAP increase.

In accordance with section 1923(f)(3)(B) of the Act, a State's DSH allotment for a FY is subject to the limitation that an increase to a State's DSH allotment for a FY cannot result in the DSH allotment exceeding the greater of the State's DSH allotment for the previous FY or 12 percent of the State's total medical assistance expenditures for the allotment year. Because States incur medical assistance expenditures throughout the fiscal year, the calculations for the 12 percent limit under section 1923(f)(3)(B)(ii) of the Act were performed using a prorated FMAP for FY 2020. To arrive at the stated limits, we prorated each State's FY 2020 FMAP rate because the temporary 6.2 percentage point FMAP increase under section 6008 of the FFCRA does not apply to the 1st quarter of FY 2020. For the calculation of the 12 percent limit for FY 2021, we used the FFCRA FMAP rate (that is, the otherwise applicable FMAP rate plus the temporary 6.2 percentage point FFCRA FMAP increase), because the FFCRA FMAP rate applies to the entire FY for qualifying States, and medical assistance expenditures are made throughout the year.

Section 1923(f)(3)(F)(i) of the Act requires us to recalculate the annual DSH allotment, including the DSH allotment specified under paragraph (6)(A)(vi), to ensure that the total DSH payments (including both Federal and State shares) that a State may make related to a fiscal year is equal to the total DSH payments that the State could have made for such fiscal year without such FMAP increase. To meet the statutory requirement to enable States to make the same amount of TC DSH payments as if the FFCRA FMAP increase were not in effect, we have used the full (non-prorated) FFCRA-increased FMAP rate in the calculation of the increased FY 2020 and FY 2021 FS DSH allotments. We used the full FFCRA-increased FMAP rate rather than a prorated FMAP rate for the FY 2020 calculation, despite it not being applicable to the 1st quarter of FY 2020, to ensure this provision applies to all States consistent with the statutory requirement, including a State that made all DSH payments for FY 2020 in quarters other than the first fiscal quarter of that fiscal year.

While States have distinct payment methodologies that specify when DSH payments are made to providers, States may not claim TC DSH payments in excess of the amount they would have otherwise been able to claim without the application of the temporary 6.2 percentage point FFCRA FMAP rate increase. This is regardless of whether a portion of unspent FS DSH allotment as adjusted to account for section 1923(f)(3)(F) of the Act, as added by section 9819 of the ARP, remains. For example, if the State made all DSH payments for FY 2020 during the first quarter of that FY, then no increase to the State's DSH allotment is available for that year, since the temporary 6.2 percentage point FMAP increase under section 6008 of the FFCRA was not available for that quarter and section 1923(f)(3)(F) therefore has no effect. We will monitor both the FS and TC DSH allotments to ensure that States do not exceed statutory authority to claim DSH payments. Consistent with previous guidance by CMS during the public health emergency, States should follow existing Federal requirements regarding the applicability of a particular match rate available for a given quarter, including reporting prior period adjustments.

For calculation of the FY 2020 and FY 2021 IMD limits determined under section 1923(h) of the Act, we used the ARP-adjusted DSH allotments and the associated non-prorated FFCRA-increased FMAP rates for FY 2020 and FY 2021, to reflect the maximum DSH allotment amount and IMD limit that might be available to a State, for FY 2020, depending on the State's timing of DSH payments.

In general, we determine States' DSH allotments for a FY and the IMD DSH limits for the same FY using the most recent available estimates of or actual medical assistance expenditures, including DSH expenditures and the most recent available CPI–U data for the FY in accordance with the methodology prescribed in the statute. The indicated estimated or actual expenditures are obtained from States for each relevant FY from the most recent available quarterly Medicaid budget reports (Form CMS–37) or quarterly Medicaid expenditure reports (Form CMS–64), respectively, submitted by the States. For example, as part of the initial determination of a State's FY DSH allotment (referred to as the preliminary DSH allotments) that is determined before the beginning of the FY for which the DSH allotments and IMD DSH limits are being determined, we use estimated expenditures for the FY obtained from the August submission of the CMS–37 submitted by States prior to the beginning of the FY; such estimated expenditures are subject to update and revision during the FY before actual expenditure data become available. We also use the most recent available estimated CPI–U percentage change that

is available before the beginning of the FY for determining the States' preliminary FY DSH allotments; such estimated CPI–U percentage change is subject to update and revision during the FY before the actual CPI–U percentage change becomes available. In determining the final DSH allotments and IMD DSH limits for a FY we use the actual expenditures for the FY and actual CPI–U percentage change for the previous FY.

II. Provisions of the Notice

A. Calculation of the Final FY 2018 and FY 2019 FS State DSH Allotments and the Preliminary FY 2020 and FY 2021 FS State DSH Allotments

1. Final FY 2018 FS State DSH Allotments

Addendum 1 to this notice provides the States' final FY 2018 DSH allotments determined in accordance with section 1923(f)(3) of the Act. As described in the background section, in general, the DSH allotment for a FY is calculated by increasing the FY DSH allotment for the preceding FY by the CPI–U increase for the previous fiscal year. For purposes of calculating the States' final FY 2018 DSH allotments, the preceding final fiscal year DSH allotments (for FY 2017) were published in the February 11, 2019 **Federal Register** (84 FR 3169). For purposes of calculating the States' final FY 2018 DSH allotments we are using the actual Medicaid expenditures for FY 2018. Finally, for purposes of calculating the States' final FY 2018 DSH allotments, the applicable historical percentage change in the CPI–U for the previous FY (FY 2017) was 2.1 percent; we note that this is lower than the estimated 2.4 percentage change in the CPI–U for FY 2017 that was available and used in the calculation of the preliminary FY 2018 DSH allotments which were published in the July 6, 2018 **Federal Register** (83 FR 31536).

2. Final FY 2019 FS State DSH Allotments

Addendum 2 to this notice provides the States' final FY 2019 DSH allotments determined in accordance with section 1923(f)(3) of the Act. As described in the background section, in general, the DSH allotment for a FY is calculated by increasing the FY DSH allotment for the preceding FY by the CPI–U increase for the previous fiscal year. For purposes of calculating the States' final FY 2019 DSH allotments, the preceding final fiscal year DSH allotments (for FY 2018) are being published in this notice. For purposes of calculating the States' final FY 2019 DSH allotments we are using the actual Medicaid expenditures for FY 2019. Finally, for purposes of calculating the States' final FY 2019 DSH allotments, the applicable historical percentage change in the CPI–U for the previous FY (FY 2018) was 2.4 percent; we note that this is the same as the estimated 2.4 percentage change in the CPI–U for FY 2018 that was available and used in the calculation of the preliminary FY 2019 DSH allotments which were published in the February 11, 2019 **Federal Register** (84 FR 3169).

3. Calculation of the Preliminary FY 2020 FS State DSH Allotments

Addendum 3 to this notice provides the preliminary FY 2020 DSH allotments determined in accordance with section 1923(f)(3) of the Act. The preliminary FY 2020 DSH allotments contained in this notice were determined based on the most recent available estimates from States of their FY 2020 total computable Medicaid expenditures and by increasing the preliminary FY 2019 DSH allotments. The applicable historical percentage change in the CPI–U for FY 2019 was 1.9 percent (we originally published the preliminary FY 2019 DSH allotments in the February 11, 2019 **Federal Register** (84 FR 3169)). We then used each State's FS DSH allotment divided by its respective regular FMAP rate in order to determine the TC amount of DSH payments each State would have otherwise been able to make without application of the FFCRA-increased FMAP rate. We then multiplied each State's TC DSH payment amount by its respective FFCRA-increased FMAP rate in order to calculate the increased FY 2020 DSH allotment.

We will publish States' final FY 2020 DSH allotments in a future notice based on the States' four quarterly Medicaid expenditure reports (Form CMS–64) for FY 2020 available following the end of FY 2020 utilizing the actual change in the CPI–U for FY 2019.

4. Calculation of the Preliminary FY 2021 FS State DSH Allotments

Addendum 4 to this notice provides the preliminary FY 2021 DSH allotments determined in accordance with section 1923(f)(3) of the Act. The preliminary FY 2021 DSH allotments contained in this notice were determined based on the most recent available estimates from States of their FY 2021 total computable Medicaid expenditures and by increasing the preliminary FY 2020 DSH allotments calculated prior to the application of the ARP adjustment. The applicable historical percentage change in the CPI–U for FY 2020 was 1.5 percent (we are publishing the preliminary FY 2020 DSH allotments in this notice). We then used each State's FS DSH allotment divided by its respective regular FMAP rate in order to determine the TC amount of DSH payments each State would have otherwise been able to make without application of the FFCRA-increased FMAP rate. We then multiplied each State's TC DSH payment amount by its respective FFCRA-increased FMAP rate in order to calculate the ARP-adjusted FY 2021 DSH allotment.

We will publish States' final FY 2021 DSH allotments in a future notice based on the States' four quarterly Medicaid expenditure reports (Form CMS–64) for FY 2021 available following the end of FY 2021.

B. Calculation of the Final FY 2018 and FY 2019 and Preliminary FY 2020 and FY 2021 IMD DSH Limits

Section 1923(h) of the Act specifies the methodology to be used to establish the limits on the amount of DSH payments that a State can make to IMDs and other mental health facilities. FFP is not available for DSH payments to IMDs or other mental health facilities that exceed the IMD DSH limits. In this notice, we are publishing the final FY 2018 and FY 2019 and the preliminary FY 2020 and FY 2021 IMD DSH limits determined in accordance with the provisions discussed above.

Addendums 5 through 8 to this notice detail each State's final FY 2018 and FY 2019 and preliminary FY 2020 and FY 2021 IMD DSH limits, respectively, determined in accordance with section 1923(h) of the Act.

III. Collection of Information Requirements

As it relates to the Paperwork Reduction Act of 1995 (PRA; 44 U.S.C. 3501 *et seq.*), this notice does not impose any new or revised ''collection of information'' requirements or burden. With respect to the PRA and this section of the preamble, collection of information is defined under 5 CFR 1320.3(c) of the PRA's implementing regulations. While discussed in sections I.B., I.C., II.A.3., II.A.4., and in Addendums 3 through 8 of this notice, the requirements and burden associated with form CMS–37 and form CMS–64 are unaffected by this notice. Both forms are approved by the Office of Management and Budget (OMB) under control number 0938–1265, which expires on April 30, 2024. Since this notice will not impose any new or revised collection of information requirements/burden, we are not

making any changes under that control number.

IV. Regulatory Impact Analysis

We have examined the impact of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; enacted on March 22, 1995) (UMRA '95), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This notice reaches the $100 million economic threshold and thus has been designated a major rule under the Congressional Review Act by the Office of Information and Regulatory Affairs.

The final FY 2018 DSH allotments being published in this notice are $36 million less than the preliminary FY 2018 DSH allotments published in the July 6, 2018 **Federal Register** (83 FR 31536). This is due to the actual percentage change in the CPI–U for FY 2017 used in the calculation of the final FY 2018 allotments (2.1 percent) being less than the estimated percentage change in the CPI–U for FY 2017 used in the calculation of the preliminary FY 2018 allotments (2.4 percent). The final FY 2018 IMD DSH limits being published in this notice are $2.4 million less than the preliminary FY 2018 IMD DSH limits published in the July 6, 2018 **Federal Register** (83 FR 31536). Since the final FY 2018 DSH allotments were less than the preliminary FY 2018 DSH allotments, the associated FY 2018 IMD DSH limits also decreased.

The final FY 2019 DSH allotments being published in this notice are $36 million less than the preliminary FY 2019 DSH allotments published in the February 11, 2019 **Federal Register** (84 FR 3169). The decrease in the final FY 2019 DSH allotments is a result of being calculated by multiplying the actual increase in the CPI–U for 2018 by the final FY 2018 DSH allotments, while the preliminary FY 2019 DSH allotments were calculated by multiplying the estimated CPI–U for 2018 by the preliminary FY 2018 DSH allotments. Although the estimated and actual increase in the CPI–U remained the same at 2.4 percent, the preliminary FY 2018 DSH allotments were higher than the final FY 2018 DSH allotments and therefore the final FY 2019 DSH allotments are lower than the preliminary FY 2019 DSH allotments. The final FY 2019 IMD DSH limits being published in this notice are approximately $2 million lower than the preliminary FY 2019 IMD DSH limits published in the February 11, 2019 **Federal Register** (84 FR 3169). The decreases in the IMD DSH limits are because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the final FY 2019 DSH allotments were decreased as compared to the preliminary FY 2019 DSH allotments, the associated FY 2019 IMD DSH limits for some States were also decreased. This is a result of statutory provision, discussed above, that the aggregate limit for DSH payments to IMDs and other mental health facilities is the lesser of a State's FY 1995 total computable IMD and other mental health facility DSH expenditures applicable to the State's FY 1995 DSH allotment or the amount equal to the product of the State's current year total computable DSH allotment and the applicable percentage specified in section 1923(h) of the Act. As a result of the final FY 2019 DSH allotments decreasing from the preliminary FY 2019 DSH allotments, States that had applicable percentages of their current year's total computable DSH allotments lower than FY 1995 total computable IMD and other mental health facility DSH expenditures had their IMD limits decreased as a result.

The preliminary FY 2020 DSH allotments being published in this notice have been increased by approximately $1.6 billion more than the preliminary FY 2019 DSH allotments published in the February 11, 2019 **Federal Register** (84 FR 3169). The increase in the DSH allotments is due to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI–U for the prior fiscal year, and to the ARP adjustment, as discussed in more detail in the next paragraph. The preliminary FY 2020 IMD DSH limits being published in this notice are approximately $246 million more than the preliminary FY 2019 IMD DSH limits published in the February 11, 2019 **Federal Register** (84 FR 3169). The increases in the IMD DSH limits are because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the preliminary FY 2020 DSH allotments are greater than the preliminary FY 2019 DSH allotments, the associated preliminary FY 2020 IMD DSH limits for some States also increased.

The preliminary FY 2020 DSH allotments (before application of the ARP adjustment) being published in this in this notice are approximately $238 million more than the final FY 2019 DSH allotments being published in this notice. This increase is attributable to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI–U for the prior fiscal year. The applicable historical percentage change in the CPI–U for FY 2019 was 1.9 percent. The preliminary FY 2020 DSH allotments were further increased by approximately $1.4 billion in order to comply with the statutory provisions of the ARP requiring us to recalculate FS DSH allotments to an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA FMAP increase.

The preliminary FY 2021 DSH allotments (before application of the ARP adjustment) being published in this notice are approximately $192 million more than the preliminary FY 2020 DSH allotments published in this notice. The increase in the DSH allotments is due to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI–U for the prior fiscal year. The applicable historical percentage change in the CPI–U for FY 2020 was 1.5 percent. The preliminary FY 2020 DSH allotments were increased by approximately $1.4 billion in order to comply with the statutory provisions of the ARP requiring us to recalculate FS DSH allotments to an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA FMAP increase. The preliminary FY 2021 DSH allotments were further increased by approximately $1.4 billion in order to comply with the statutory provisions of the ARP requiring us to recalculate FS DSH allotments to an amount that will allow States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA FMAP increase.

The preliminary FY 2021 IMD DSH limits being published in this notice are approximately $16 million more than the preliminary FY 2020 IMD DSH limits published in this notice. The increases in the IMD DSH limits are because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the preliminary FY 2021 DSH allotments are greater than the preliminary FY 2020 DSH allotments, the associated preliminary FY 2021 IMD DSH limits for some States also increased.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $8.0 million to $41.5 million in any one year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the Secretary has determined that this notice will not have significant economic impact on a substantial number of small entities. Specifically, any impact on providers is due to the effect of the various controlling statutes; providers are not impacted as a result of the independent regulatory action in publishing this notice. The purpose of the notice is to announce the latest DSH allotments and IMD DSH limits, as required by the statute.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Core-Based Statistical Area for Medicaid payment regulations and has fewer than 100 beds. We are not preparing analysis for section 1102(b) of the Act because the Secretary has determined that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

The Medicaid statute specifies the methodology for determining the amounts of States' DSH allotments and IMD DSH limits; and as described previously, the application of the methodology specified in statute results in the decreases or increases in States' DSH allotments and IMD DSH limits for the applicable FYs. The statute applicable to these allotments and limits does not apply to the determination of the amounts of DSH payments made to specific DSH hospitals; rather, these allotments and limits represent an overall limit on the total of such DSH payments. For this reason, we do not believe that this notice will have a significant economic impact on a substantial number of small entities.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2021, that threshold is approximately $158 million. This notice will have no consequential effect on spending by State, local, or tribal governments, in the aggregate, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this notice does not impose any costs on State or local governments or otherwise have Federalism implications, the requirements of E.O. 13132 are not applicable.

A. Alternatives Considered

Because the FFCRA temporary FMAP increase of 6.2 percentage points was not applicable to the 1st quarter of FY 2020, we considered utilizing prorated FMAP rates in the calculation of the ARP-adjusted FY 2020 DSH allotments. However, this could have been contrary to the statutory language at section 1923(f)(3)(F) of the Act requiring us to recalculate FS DSH allotments to an amount to allow for States to make the same amount of TC DSH payments as they would have been otherwise able to make in the absence of the FFCRA FMAP increase, depending on States' timing of their DSH payments to eligible providers. The methodologies for determining the States' fiscal year DSH allotments and IMD DSH limits, as reflected in this notice, were established in accordance with the methodologies and formula for determining States' allotments and limits as specified in statute. This notice does not put forward any further discretionary administrative policies for determining such allotments and limits, or otherwise.

B. Accounting Statement

As required by OMB Circular A–4 (available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/*), in Tables 1 and 2, we have prepared an accounting statement showing the classification of the estimated expenditures associated with the provisions of this notice. Table 1 provides our best estimate of the change (decrease) in the FS of States' Medicaid DSH payments resulting from the application of the provisions of the Medicaid statute relating to the calculation of States' FY DSH allotments and the increase in the FY DSH allotments from FY 2019 to FY 2020. Table 2 provides our best estimate of the change (decrease) in the FS of States' Medicaid DSH payments resulting from the application of the provisions of the Medicaid statute relating to the calculation of States' FY DSH allotments and the increase in the FY DSH allotments from FY 2020 to FY 2021.

TABLE 1—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE FY 2019 TO FY 2020

[In millions]

Category	Transfers
Annualized Monetized Transfers.	$238.
From Whom To Whom?	Federal Government to States.

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE FY 2020 TO FY 2021

[In millions]

Category	Transfers
Annualized Monetized Transfers.	$192.
From Whom To Whom?	Federal Government to States.

C. Congressional Review Act

This document is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to the Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on February 1, 2022.

Dated: March 9, 2022.

Xavier Becerra,

Secretary, Department of Health and Human Services.

BILLING CODE 4120–01–P

Key to ADDENDUM 1: Final DSH Allotments for FY 2018.

The Final FY 2018 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Final FY 2018 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum.	
Column	**Description**
Column A	**State.**
Column B	**FY 2018 FMAPs.** This column contains the States' FY 2018 Federal Medical Assistance Percentages.
Column C	**Prior FY (2017) DSH Allotments** This column contains the States' prior FY 2017 DSH Allotments.
Column D	**Prior FY (2017) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 102.1 percent.** This column contains the amount in Column C increased by 1 plus the percentage increase in the CPI-U for the prior FY (102.1 percent).
Column E	**FY 2018 TC MAP Exp. Including DSH.** This column contains the amount of the States' FY 2018 total computable (TC) medical assistance expenditures including DSH expenditures.
Column F	**FY 2018 TC DSH Expenditures.** This column contains the amount of the States' FY 2018 total computable DSH expenditures.
Column G	**FY 2018 TC MAP Exp. Net of DSH.** This column contains the amount of the States' FY 2018 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F.
Column H	**12 percent Amount.** This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act.
Column I	**Greater of FY 2017 Allotment or 12 percent Limit.** This column contains the greater of the State's prior FY (FY 2017) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H.
Column J	**FY 2018 DSH Allotment.** This column contains the States' final FY 2018 DSH allotments, determined as the lesser of the amount in Column I or Column D. For States with "na" in Columns I or D, refer to the footnotes in the addendum.

ADDENDUM 1: FINAL DSH ALLOTMENTS FOR FISCAL YEAR: 2018

A	B	C	D	E	F	G	H	I	J
STATE	FY 2018 FMAPs	Prior FY 2017 DSH Allotments	Prior FY 2017 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 102.1%	FY 2018 TC MAP Exp. Including DSH	FY 2018 TC DSH Expenditures	FY 2018 TC MAP EXP. Net Of DSH Col E – F	"12% Amount" =Col G x .12/(1-.12/Col B)* (In FS)	Greater of Col H Or Col C (12% Limit, 2017 Allotment)	FY 2018 Allotment MIN Col I, Col D
ALABAMA	71.44%	$337,526,148	$344,614,197	$5,546,416,592	$483,800,080	$5,062,616,512	$730,161,488	$730,161,488	**$344,614,197**
ARIZONA	69.89%	$111,136,659	$113,470,529	$12,132,120,126	$145,392,453	$11,986,727,673	$1,736,574,325	$1,736,574,325	**$113,470,529**
CALIFORNIA	50.00%	$1,203,294,436	$1,228,563,619	$82,452,158,773	$590,799,895	$81,861,358,878	$12,925,477,718	$12,925,477,718	**$1,228,563,619**
COLORADO	50.00%	$101,532,256	$103,664,433	$8,925,796,867	$172,633,510	$8,753,163,357	$1,382,078,425	$1,382,078,425	**$103,664,433**
CONNECTICUT	50.00%	$219,529,202	$224,139,315	$8,175,809,143	$65,953,090	$8,109,856,053	$1,280,503,587	$1,280,503,587	**$224,139,315**
DISTRICT OF COLUMBIA	70.00%	$67,230,818	$68,642,665	$2,804,976,949	$45,672,974	$2,759,303,975	$399,623,334	$399,623,334	**$68,642,665**
FLORIDA	61.79%	$219,529,202	$224,139,315	$22,893,250,365	$354,298,478	$22,538,951,887	$3,356,533,851	$3,356,533,851	**$224,139,315**
GEORGIA	68.50%	$294,992,365	$301,187,205	$10,839,404,783	$440,929,969	$10,398,474,814	$1,512,840,053	$1,512,840,053	**$301,187,205**
ILLINOIS	50.74%	$235,993,892	$240,949,764	$22,194,828,973	$335,211,129	$21,859,617,844	$3,435,695,434	$3,435,695,434	**$240,949,764**
INDIANA	65.59%	$234,621,836	$239,548,895	$11,241,808,216	$70,804,957	$11,171,003,259	$1,640,692,899	$1,640,692,899	**$239,548,895**
KANSAS	54.74%	$45,277,897	$46,228,733	$3,437,703,549	$105,885,545	$3,331,818,004	$512,074,078	$512,074,078	**$46,228,733**
KENTUCKY	71.17%	$159,158,672	$162,501,004	$9,801,380,491	$219,723,609	$9,581,656,882	$1,382,984,324	$1,382,984,324	**$162,501,004**
LOUISIANA	63.69%	$752,615,495	$768,420,420	$10,835,742,015	$1,249,458,291	$9,586,283,724	$1,417,412,444	$1,417,412,444	**$768,420,420**
MAINE	64.34%	$115,252,830	$117,673,139	$2,686,772,711	$43,445,330	$2,643,327,381	$389,923,616	$389,923,616	**$117,673,139**
MARYLAND	50.00%	$83,695,509	$85,453,115	$11,417,338,026	$100,737,115	$11,316,600,911	$1,786,831,723	$1,786,831,723	**$85,453,115**
MASSACHUSETTS	50.00%	$334,782,032	$341,812,455	$17,655,414,020	$0	$17,655,414,020	$2,787,696,951	$2,787,696,951	**$341,812,455**
MICHIGAN	64.78%	$290,876,193	$296,984,593	$16,286,594,101	$602,706,754	$15,683,887,347	$2,309,970,949	$2,309,970,949	**$296,984,593**
MISSISSIPPI	75.65%	$167,391,016	$170,906,227	$5,278,728,403	$226,511,022	$5,052,217,381	$720,566,055	$720,566,055	**$170,906,227**
MISSOURI	64.61%	$520,009,796	$530,930,002	$10,296,294,908	$782,436,584	$9,513,858,324	$1,402,068,929	$1,402,068,929	**$530,930,002**
NEVADA	65.75%	$50,766,127	$51,832,216	$3,922,474,284	$79,057,657	$3,843,416,627	$564,177,808	$564,177,808	**$51,832,216**
NEW HAMPSHIRE	50.00%	$175,731,503	$179,421,865	$2,150,375,296	$227,711,926	$1,922,663,370	$303,578,427	$303,578,427	**$179,421,865**
NEW JERSEY	50.00%	$706,609,619	$721,448,421	$14,843,185,053	$781,281,583	$14,061,903,470	$2,220,300,548	$2,220,300,548	**$721,448,421**
NEW YORK	50.00%	$1,763,093,901	$1,800,118,873	$73,030,082,745	$4,061,662,631	$68,968,420,114	$10,889,750,544	$10,889,750,544	**$1,800,118,873**
NORTH CAROLINA	67.61%	$323,805,572	$330,605,489	$13,339,097,405	$536,974,390	$12,802,123,015	$1,867,760,914	$1,867,760,914	**$330,605,489**
OHIO	62.78%	$445,918,692	$455,282,985	$21,743,887,373	$93,432,758	$21,650,454,615	$3,212,009,943	$3,212,009,943	**$455,282,985**
PENNSYLVANIA	51.82%	$616,053,822	$628,990,952	$29,863,557,849	$942,990,144	$28,920,567,705	$4,516,314,872	$4,516,314,872	**$628,990,952**
RHODE ISLAND	51.45%	$71,346,990	$72,845,277	$2,620,033,271	$138,519,196	$2,481,514,075	$388,361,670	$388,361,670	**$72,845,277**
SOUTH CAROLINA	71.58%	$359,479,068	$367,028,128	$6,006,492,924	$526,108,667	$5,480,384,257	$790,102,528	$790,102,528	**$367,028,128**
TENNESSEE /1	na	$53,100,000	na	na	na	na	na	na	**$53,100,000**
TEXAS	56.88%	$1,049,623,997	$1,071,666,101	$37,585,413,327	$1,885,527,269	$35,699,886,058	$5,429,437,217	$5,429,437,217	**$1,071,666,101**

A	B	C	D	E	F	G	H	I	J
STATE	FY 2018 FMAPs	Prior FY 2017 DSII Allotments	Prior FY 2017 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 102.1%	FY 2018 TC MAP Exp. Including DSII	FY 2018 TC DSII Expenditures	FY 2018 TC MAP EXP. Net Of DSII Col E – F	"12% Amount" =Col G x .12/(1-.12/Col B)* (In FS)	Greater of Col H Or Col C (12% Limit, 2017 Allotment)	FY 2018 Allotment MIN Col I, Col D
VERMONT	53.47%	$24,697,037	$25,215,675	$1,595,969,592	$27,448,780	$1,568,520,812	$242,687,652	$242,687,652	**$25,215,675**
VIRGINIA	50.00%	$96,162,104	$98,181,508	$9,562,002,903	$207,704,058	$9,354,298,845	$1,476,994,554	$1,476,994,554	**$98,181,508**
WASHINGTON	50.00%	$203,064,512	$207,328,867	$12,093,602,904	$342,498,885	$11,751,104,019	$1,855,437,477	$1,855,437,477	**$207,328,867**
WEST VIRGINIA	73.24%	$74,091,106	$75,647,019	$3,854,175,868	$71,874,400	$3,782,301,468	$542,813,376	$542,813,376	**$75,647,019**
TOTAL	**0.00%**	**$11,507,990,304**	**$11,695,443,000**	**$507,112,889,805**	**$15,959,193,129**	**$491,153,696,676**	**$75,409,437,712**	**$75,409,437,712**	**$11,748,543,001**
LOW DSH STATES									
ALASKA	50.00%	**$22,358,712**	**$22,828,245**	$2,033,389,399	$17,641,931	$2,015,747,468	$318,275,916.00	$318,275,916	**$22,828,245**
ARKANSAS	70.87%	**$47,350,016**	**$48,344,366**	$6,308,079,740	$44,512,042	$6,263,567,698	$904,839,224	$904,839,224	**$48,344,366**
DELAWARE	56.43%	**$9,937,205**	**$10,145,886**	$2,237,920,184	$14,364,693	$2,223,555,491	$338,893,278	$338,893,278	**$10,145,886**
HAWAII	54.78%	**$10,697,430**	**$10,922,076**	$2,213,115,909	$0	$2,213,115,909	$340,068,694.24	$340,068,694	**$10,922,076**
IDAHO	71.17%	**$18,042,558**	**$18,421,452**	$1,901,290,685	$25,162,099	$1,876,128,586	$270,794,128.37	$270,794,128	**$18,421,452**
IOWA	58.48%	**$43,226,550**	**$44,134,308**	$4,828,425,247	$82,663,801	$4,745,761,446	$716,520,127	$716,520,127	**$44,134,308**
MINNESOTA	50.00%	**$81,981,945**	**$83,703,566**	$12,324,543,789	$67,255,268	$12,257,288,521	$1,935,361,345	$1,935,361,345	**$83,703,566**
MONTANA	65.38%	**$12,459,133**	**$12,720,775**	$1,830,172,657	$841,464	$1,829,331,193	$268,868,505	$268,868,505	**$12,720,775**
NEBRASKA	52.55%	**$31,061,430**	**$31,713,720**	$2,126,639,801	$39,634,823	$2,087,004,978	$324,553,721	$324,553,721	**$31,713,720**
NEW MEXICO	72.16%	**$22,358,712**	**$22,828,245**	$5,112,309,656	$52,117,849	$5,060,191,807	$728,344,629	$728,344,629	**$22,828,245**
NORTH DAKOTA	50.00%	**$10,484,694**	**$10,704,873**	$1,222,239,306	$972,026	$1,221,267,280	$192,831,676	$192,831,676	**$10,704,873**
OKLAHOMA	58.57%	**$39,748,819**	**$40,583,544**	$4,433,479,661	$44,049,535	$4,389,430,126	$662,458,035	$662,458,035	**$40,583,544**
OREGON	63.62%	**$49,686,028**	**$50,729,435**	$8,877,365,993	$60,890,048	$8,816,475,945	$1,303,922,975	$1,303,922,975	**$50,729,435**
SOUTH DAKOTA	55.34%	**$12,123,113**	**$12,377,698**	$865,504,172	$1,667,785	$863,836,387	$132,361,898	$132,361,898	**$12,377,698**
UTAH	70.26%	**$21,533,602**	**$21,985,808**	$2,421,929,601	$24,699,656	$2,397,229,945	$346,919,415	$346,919,415	**$21,985,808**
WISCONSIN	58.77%	**$103,763,574**	**$105,942,609**	$8,768,743,868	$70,518,104	$8,698,225,764	$1,311,596,480	$1,311,596,480	**$105,942,609**
WYOMING	50.00%	**$248,430**	**$253,647**	$595,439,375	$496,860	$594,942,515	$93,938,292	$93,938,292	**$253,647**
TOTAL LOW DSH STATES	0.00%	**$537,061,951**	**$548,340,252**	**$68,100,589,043**	**$547,487,984**	**$67,553,101,059**	**$10,190,548,341**	**$10,190,548,341**	**$548,340,253**
TOTAL	0.00%	**$12,045,052,255**	**$12,243,783,252**	**$575,213,478,848**	**$16,506,681,113**	**$558,706,797,735**	**$85,599,986,053**	**$85,599,986,053**	**$12,296,883,254**

FOOTNOTES:

/1 Tennessee's DSII allotment for FY 2018, determined under section 1923(f)(6)(A) of the Social Security Act, is $53,100,000.

Key to ADDENDUM 2: Final DSH Allotments for FY 2019.

The Final FY 2019 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Final FY 2018 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum.	
Column	**Description**
Column A	**State.**
Column B	**FY 2019 FMAPs.** This column contains the States' FY 2019 Federal Medical Assistance Percentages.
Column C	**Prior FY (2018) DSH Allotments** This column contains the States' prior FY 2018 DSH Allotments.
Column D	**Prior FY (2018) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 102.1 percent.** This column contains the amount in Column C increased by 1 plus the percentage increase in the CPI-U for the prior FY (102.4 percent).
Column E	**FY 2019 TC MAP Exp. Including DSH.** This column contains the amount of the States' FY 2019 total computable (TC) medical assistance expenditures including DSH expenditures.
Column F	**FY 2019 TC DSH Expenditures.** This column contains the amount of the States' FY 2019 total computable DSH expenditures.
Column G	**FY 2019 TC MAP Exp. Net of DSH.** This column contains the amount of the States' FY 2019 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F.
Column H	**12 percent Amount.** This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act.
Column I	**Greater of FY 2018 Allotment or 12 percent Limit.** This column contains the greater of the State's prior FY (FY 2017) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H.
Column J	**FY 2019 DSH Allotment.** This column contains the States' final FY 2018 DSH allotments, determined as the lesser of the amount in Column I or Column D. For States with "na" in Columns I or D, refer to the footnotes in the addendum.

ADDENDUM 2: FINAL DSH ALLOTMENTS FOR FISCAL YEAR: 2019

A	B	C	D	E	F	G	H	I	J
STATE	FY 2019 FMAPs	Prior FY 2018 DSH Allotments	Prior FY 2018 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 102.4%	FY 2019 TC MAP Exp. Including DSH	FY 2019 TC DSH Expenditures	FY 2019 TC MAP EXP. Net Of DSH Col E - F	"12% Amount" =Col G x .12/(1-.12/Col B)* (In FS)	Greater of Col H Or Col C (12% Limit, 2018 Allotment)	FY 2019 Allotment MIN Col I, Col D
ALABAMA	71.88%	$344,614,197	$352,884,938	$5,880,233,770	$489,518,808	$5,390,714,962	$776,522,227	$776,522,227	**$352,884,938**
ARIZONA	69.81%	$113,470,529	$116,193,822	$13,167,873,159	$163,891,951	$13,003,981,208	$1,884,396,322	$1,884,396,322	**$116,193,822**
CALIFORNIA	50.00%	$1,228,563,619	$1,258,049,146	$87,855,979,661	$636,488,112	$87,219,491,549	$13,771,498,666	$13,771,498,666	**$1,258,049,146**
COLORADO	50.00%	$103,664,433	$106,152,379	$9,201,828,436	$248,233,120	$8,953,595,316	$1,413,725,576	$1,413,725,576	**$106,152,379**
CONNECTICUT	50.00%	$224,139,315	$229,518,659	$8,168,318,604	$108,764,367	$8,059,554,237	$1,272,561,195	$1,272,561,195	**$229,518,659**
DISTRICT OF COLUMBIA	70.00%	$68,642,665	$70,290,089	$2,892,033,951	$88,375,348	$2,803,658,603	$406,047,108	$406,047,108	**$70,290,089**
FLORIDA	60.87%	$224,139,315	$229,518,659	$24,384,268,451	$358,327,977	$24,025,940,474	$3,591,059,538	$3,591,059,538	**$229,518,659**
GEORGIA	67.62%	$301,187,205	$308,415,698	$10,851,623,393	$455,848,516	$10,395,774,877	$1,516,639,260	$1,516,639,260	**$308,415,698**
ILLINOIS	50.31%	$240,949,764	$246,732,558	$18,470,094,556	$294,583,142	$18,175,511,414	$2,864,244,258	$2,864,244,258	**$246,732,558**
INDIANA	65.96%	$239,548,895	$245,298,068	$12,439,243,969	$267,372,265	$12,171,871,704	$1,785,448,460	$1,785,448,460	**$245,298,068**
KANSAS	57.10%	$46,228,733	$47,338,223	$3,601,873,235	$82,473,677	$3,519,399,558	$534,699,019	$534,699,019	**$47,338,223**
KENTUCKY	71.67%	$162,501,004	$166,401,028	$10,207,733,005	$252,851,013	$9,954,881,992	$1,434,824,318	$1,434,824,318	**$166,401,028**
LOUISIANA	65.00%	$768,420,420	$786,862,510	$11,642,038,286	$1,176,791,862	$10,465,246,424	$1,540,168,342	$1,540,168,342	**$786,862,510**
MAINE	64.52%	$117,673,139	$120,497,294	$2,867,136,972	-$38,464,682	$2,905,601,654	$428,338,352	$428,338,352	**$120,497,294**
MARYLAND	50.00%	$85,453,115	$87,503,990	$11,730,186,550	$57,679,449	$11,672,507,101	$1,843,027,437	$1,843,027,437	**$87,503,990**
MASSACHUSETTS	50.00%	$341,812,455	$350,015,954	$17,412,670,180	$0	$17,412,670,180	$2,749,368,976	$2,749,368,976	**$350,015,954**
MICHIGAN	64.45%	$296,984,593	$304,112,223	$18,257,869,906	$321,231,576	$17,936,638,330	$2,644,841,961	$2,644,841,961	**$304,112,223**
MISSISSIPPI	76.39%	$170,906,227	$175,007,976	$5,506,770,865	$230,088,245	$5,276,682,620	$751,208,173	$751,208,173	**$175,007,976**
MISSOURI	65.40%	$530,930,002	$543,672,322	$10,534,803,881	$744,928,081	$9,789,875,800	$1,438,781,747	$1,438,781,747	**$543,672,322**
NEVADA	64.87%	$51,832,216	$53,076,189	$3,978,540,873	$101,825,697	$3,876,715,176	$570,794,432	$570,794,432	**$53,076,189**
NEW HAMPSHIRE	50.00%	$179,421,865	$183,727,990	$1,985,132,112	$269,915,034	$1,715,217,078	$270,823,749	$270,823,749	**$183,727,990**
NEW JERSEY	50.00%	$721,448,421	$738,763,183	$15,908,523,928	$1,122,906,714	$14,785,617,214	$2,334,571,139	$2,334,571,139	**$738,763,183**
NEW YORK	50.00%	$1,800,118,873	$1,843,321,726	$58,094,211,692	$3,540,716,183	$54,553,495,509	$8,613,709,817	$8,613,709,817	**$1,843,321,726**
NORTH CAROLINA	67.16%	$330,605,489	$338,540,021	$13,595,881,059	$474,088,974	$13,121,792,085	$1,917,170,899	$1,917,170,899	**$338,540,021**
OHIO	63.09%	$455,282,985	$466,209,777	$23,465,691,647	$1,408,672,852	$22,057,018,795	$3,268,531,570	$3,268,531,570	**$466,209,777**
PENNSYLVANIA	52.25%	$628,990,952	$644,086,735	$32,079,703,325	$1,103,593,626	$30,976,109,699	$4,825,346,778	$4,825,346,778	**$644,086,735**
RHODE ISLAND	52.57%	$72,845,277	$74,593,564	$2,586,208,738	$142,293,259	$2,443,915,479	$380,014,701	$380,014,701	**$74,593,564**
SOUTH CAROLINA	71.22%	$367,028,128	$375,836,803	$6,305,731,666	$558,921,658	$5,746,810,008	$829,357,262	$829,357,262	**$375,836,803**
TENNESSEE /1	na	$53,100,000	na	na	na	na	na	na	**$53,100,000**
TEXAS	58.19%	$1,071,666,101	$1,097,386,087	$40,025,676,488	$1,950,731,852	$38,074,944,636	$5,756,001,806	$5,756,001,806	**$1,097,386,087**
VERMONT	53.89%	$25,215,675	$25,820,851	$1,637,796,926	$22,704,470	$1,615,092,456	$249,331,103	$249,331,103	**$25,820,851**
VIRGINIA	50.00%	$98,181,508	$100,537,864	$11,307,295,979	$88,226,665	$11,219,069,314	$1,771,431,997	$1,771,431,997	**$100,537,864**
WASHINGTON	50.00%	$207,328,867	$212,304,760	$13,128,258,799	$246,326,095	$12,881,932,704	$2,033,989,374	$2,033,989,374	**$212,304,760**

A	B	C	D	E	F	G	H	I	J
STATE	FY 2019 FMAPs	Prior FY 2018 DSH Allotments	Prior FY 2018 DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 102.4%	FY 2019 TC MAP Exp. Including DSH	FY 2019 TC DSH Expenditures	FY 2019 TC MAP EXP. Net Of DSH Col E - F	"12% Amount" =Col G x .12/(1-.12/Col B)* (In FS)	Greater of Col H Or Col C (12% Limit, 2018 Allotment)	FY 2019 Allotment MIN Col I, Col D
WEST VIRGINIA	74.34%	$75,647,019	$77,462,547	$3,926,176,801	$71,837,102	$3,854,339,699	$551,552,672	$551,552,672	**$77,462,547**
TOTAL	**0.00%**	**$11,748,543,001**	**$11,976,133,633**	**$513,097,410,863**	**$17,041,743,008**	**$496,055,667,855**	**$76,020,028,233**	**$76,020,028,233**	**$12,029,233,633**
LOW DSH STATES									
ALASKA	50.00%	**$22,828,245**	**$23,376,123**	$2,096,340,139	$24,998,019	$2,071,342,120	$327,054,018.95	$327,054,019	**$23,376,123**
ARKANSAS	70.51%	**$48,344,366**	**$49,504,631**	$6,842,930,884	$81,337,090	$6,761,593,794	$977,802,041	$977,802,041	**$49,504,631**
DELAWARE	57.55%	**$10,145,886**	**$10,389,387**	$2,245,537,767	$15,106,025	$2,230,431,742	$338,163,811	$338,163,811	**$10,389,387**
HAWAII	53.92%	**$10,922,076**	**$11,184,206**	$2,178,370,796	$36,167,969	$2,142,202,827	$330,651,459.25	$330,651,459	**$11,184,206**
IDAHO	71.13%	**$18,421,452**	**$18,863,567**	$2,143,001,207	$25,974,384	$2,117,026,823	$305,599,427.54	$305,599,428	**$18,863,567**
IOWA	59.93%	**$44,134,308**	**$45,193,531**	$5,199,821,191	$70,852,976	$5,128,968,215	$769,569,952	$769,569,952	**$45,193,531**
MINNESOTA	50.00%	**$83,703,566**	**$85,712,452**	$12,720,672,282	$62,173,140	$12,658,499,142	$1,998,710,391	$1,998,710,391	**$85,712,452**
MONTANA	65.54%	**$12,720,775**	**$13,026,074**	$1,857,962,976	$1,786,546	$1,856,176,430	$272,664,482	$272,664,482	**$13,026,074**
NEBRASKA	52.58%	**$31,713,720**	**$32,474,849**	$2,141,794,131	$60,291,712	$2,081,502,419	$323,643,363	$323,643,363	**$32,474,849**
NEW MEXICO	72.26%	**$22,828,245**	**$23,376,123**	$5,262,891,223	$32,254,964	$5,230,636,259	$752,669,982	$752,669,982	**$23,376,123**
NORTH DAKOTA	50.00%	**$10,704,873**	**$10,961,790**	$1,163,970,291	$2,253,205	$1,161,717,086	$183,429,014	$183,429,014	**$10,961,790**
OKLAHOMA	62.38%	**$40,583,544**	**$41,557,549**	$4,760,177,632	$44,094,185	$4,716,083,447	$700,728,747	$700,728,747	**$41,557,549**
OREGON	62.56%	**$50,729,435**	**$51,946,941**	$9,426,870,932	$49,331,187	$9,377,539,745	$1,392,386,598	$1,392,386,598	**$51,946,941**
SOUTH DAKOTA	56.71%	**$12,377,698**	**$12,674,763**	$899,072,690	$1,504,403	$897,568,287	$136,616,679	$136,616,679	**$12,674,763**
UTAH	69.71%	**$21,985,808**	**$22,513,467**	$2,724,326,505	$32,974,994	$2,691,351,511	$390,117,721	$390,117,721	**$22,513,467**
WISCONSIN	59.37%	**$105,942,609**	**$108,485,232**	$9,132,546,898	$71,517,607	$9,061,029,291	$1,362,769,624	$1,362,769,624	**$108,485,232**
WYOMING	50.00%	**$253,647**	**$259,735**	$584,259,094	$508,784	$583,750,310	$92,171,102	$92,171,102	**$259,735**
TOTAL LOW DSH STATES	0.00%	**$548,340,253**	**$561,500,419**	**$71,380,546,638**	**$613,127,190**	**$70,767,419,448**	**$10,654,748,411**	**$10,654,748,411**	**$561,500,420**
TOTAL	0.00%	**$12,296,883,254**	**$12,537,634,052**	**$584,477,957,501**	**$17,654,870,198**	**$566,823,087,303**	**$86,674,776,644**	**$86,674,776,644**	**$12,590,734,053**

FOOTNOTES:

/1 Tennessee's DSH allotment for FY 2019 is determined under section 1923(f)(6)(A) of the Social Security Act.

Key to ADDENDUM 3: Preliminary DSH Allotments for FY 2020.

The Preliminary FY 2020 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Preliminary FY 2020 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum.	
Column	**Description**
Column A	**State.**
Column B1	**FY 2020 FMAPs.** This column contains the States' regular FY 2020 Federal Medical Assistance Percentages.
Column B2	**FY 2020 FMAPs.** This column contains the States' FFCRA FY 2020 Federal Medical Assistance Percentages.
Column B3	**FY 2020 FMAPs.** This column contains the States' prorated FY 2020 Federal Medical Assistance Percentages.
Column C	**Prior FY (2019) DSH Allotments** This column contains the States' prior preliminary FY 2019 DSH Allotments.
Column D	**Prior FY (2019) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 101.9 percent.** This column contains the amount in Column C increased by 1 plus the estimated percentage increase in the CPI-U for the prior FY (101.9 percent).
Column E	**FY 2020 TC MAP Exp. Including DSH.** This column contains the amount of the States' projected FY 2020 total computable (TC) medical assistance expenditures including DSH expenditures.
Column F	**FY 2020 TC DSH Expenditures.** This column contains the amount of the States' projected FY 2020 total computable DSH expenditures.
Column G	**FY 2020 TC MAP Exp. Net of DSH.** This column contains the amount of the States' projected FY 2020 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F.
Column H	**12 percent Amount.** This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. This is calculated using the prorated FMAP rate in Column B3.
Column I	**Greater of FY 2019 Allotment or 12 percent Limit.** This column contains the greater of the State's preliminary prior FY (FY 2019) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H.
Column J	**FS FY 2020 Unadjusted DSH Allotment.** This column contains the States' preliminary FY 2020 DSH allotments, determined as the lesser of the amount in Column I or Column D. For States with "na" in Columns I or D, refer to the footnotes in the addendum.
Column K	**FS FY 2020 ARP-adjusted DSH Allotment.** This column contains the States' preliminary FY 2020 ARP DSH allotments, determined by multiplying the FMAP in Column B2 by Column L.
Column L	**TC FY 2020 DSH Allotment.** This column contains the States' preliminary TC FY 2020 DSH allotments, determined by dividing Column B1 by Column J.

ADDENDUM 3: PRELIMINARY DSH ALLOTMENTS FOR FISCAL YEAR: 2020

A	B1	B2	B3	C	D	E	F	G	H	I	J	K	L
STATE	FY 2020 FMAPs (Regular) /1	FY 2020 FMAPs (FFCRA) /2	FY 2020 FMAPs (Prorated) /3	Prior FY (2019) DSH Allotments	Prior FY (2019) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.9%	FY 2020 TC MAP Exp. Including DSH /4	FY 2020 TC DSH Expenditures /4	FY 2020 TC MAP EXP. Net Of DSH Col E - F	"12% Amount" =Col G x .12/(1-.12/Col B3) (In FS)	Greater of Col H Or Col C (12% Limit. FY 2019 Allotment)	FY 2020 DSH Allotment MIN Col I, Col D	FY 2020 DSH FS Allotment ARP Column B2 x L	FY 2020 DSH TC Allotment Column J / B1
ALABAMA	71.97%	78.17%	76.62%	$352,884,938	$359,589,752	$6,613,468,000	$492,380,000	$6,121,088,000	$870,933,635	$870,933,635	**$359,589,752**	**$390,567,332**	**$499,638,394**
ARIZONA	70.02%	76.22%	74.67%	$116,193,822	$118,401,505	$13,544,289,000	$147,080,000	$13,397,209,000	$1,915,499,466	$1,915,499,466	**$118,401,505**	**$128,885,500**	**$169,096,694**
CALIFORNIA	50.00%	56.20%	54.65%	$1,258,049,146	$1,281,952,080	$101,180,276,000	$0	$101,180,276,000	$15,557,801,876	$15,557,801,876	**$1,281,952,080**	**$1,440,914,138**	**$2,563,904,160**
COLORADO	50.00%	56.20%	54.65%	$106,152,379	$108,169,274	$9,604,126,000	$317,750,000	$9,286,376,000	$1,427,902,786	$1,427,902,786	**$108,169,274**	**$121,582,264**	**$216,338,548**
CONNECTICUT	50.00%	56.20%	54.65%	$229,518,659	$233,879,514	$8,488,008,000	$115,798,000	$8,372,210,000	$1,287,337,706	$1,287,337,706	**$233,879,514**	**$262,880,574**	**$467,759,028**
DISTRICT OF COLUMBIA	70.00%	76.20%	74.65%	$70,290,089	$71,625,601	$2,942,645,000	$48,060,000	$2,894,585,000	$413,881,763	$413,881,763	**$71,625,601**	**$77,969,583**	**$102,322,287**
FLORIDA	61.47%	67.67%	66.12%	$229,518,659	$233,879,514	$27,020,716,000	$374,481,000	$26,646,235,000	$3,906,538,932	$3,906,538,932	**$233,879,514**	**$257,469,118**	**$380,477,491**
GEORGIA	67.30%	73.50%	71.95%	$308,415,698	$314,275,596	$11,492,574,000	$440,981,000	$11,051,593,000	$1,591,650,608	$1,591,650,608	**$314,275,596**	**$343,228,177**	**$466,977,111**
ILLINOIS	50.14%	56.34%	54.79%	$246,732,558	$251,420,477	$19,952,428,000	$442,416,000	$19,510,012,000	$2,997,766,462	$2,997,766,462	**$251,420,477**	**$282,509,567**	**$501,436,931**
INDIANA	65.84%	72.04%	70.49%	$245,298,068	$249,958,731	$15,805,501,000	$863,300,000	$14,942,201,000	$2,160,935,029	$2,160,935,029	**$249,958,731**	**$273,496,765**	**$379,645,703**
KANSAS	59.16%	65.36%	63.81%	$47,338,223	$48,237,649	$4,032,374,000	$82,007,000	$3,949,467,000	$583,706,982	$583,706,982	**$48,237,649**	**$53,292,981**	**$81,537,608**
KENTUCKY	71.82%	78.02%	76.47%	$166,401,028	$169,562,648	$11,630,588,000	$237,440,000	$11,393,148,000	$1,621,654,774	$1,621,654,774	**$169,562,648**	**$184,200,471**	**$236,093,913**
LOUISIANA	66.86%	73.06%	71.51%	$786,862,510	$801,812,898	$13,553,036,000	$1,120,631,000	$12,432,405,000	$1,792,723,135	$1,792,723,135	**$801,812,898**	**$876,165,874**	**$1,199,241,547**
MAINE	63.80%	70.00%	68.45%	$120,497,294	$122,786,743	$3,339,455,000	$53,712,000	$3,285,743,000	$478,106,165	$478,106,165	**$122,786,743**	**$134,718,997**	**$192,455,710**
MARYLAND	50.00%	56.20%	54.65%	$87,503,990	$89,166,566	$12,189,936,000	$101,211,000	$12,088,725,000	$1,858,800,904	$1,858,800,904	**$89,166,566**	**$100,223,220**	**$178,333,132**
MASSACHUSETTS	50.00%	56.20%	54.65%	$350,015,954	$356,666,257	$19,348,878,000	$0	$19,348,878,000	$2,975,145,180	$2,975,145,180	**$356,666,257**	**$400,892,873**	**$713,332,514**
MICHIGAN	64.06%	70.26%	68.71%	$304,112,223	$309,890,355	$20,629,908,000	$446,032,000	$20,183,876,000	$2,934,581,104	$2,934,581,104	**$309,890,355**	**$339,882,865**	**$483,750,164**
MISSISSIPPI	76.98%	83.18%	81.63%	$175,007,976	$178,333,128	$5,724,344,000	$233,710,000	$5,490,634,000	$772,426,460	$772,426,460	**$178,333,128**	**$192,696,149**	**$231,661,637**
MISSOURI	65.65%	71.85%	70.30%	$543,672,322	$554,002,096	$10,866,522,000	$796,827,000	$10,069,695,000	$1,457,083,139	$1,457,083,139	**$554,002,096**	**$606,322,172**	**$843,872,195**
NEVADA	63.93%	70.13%	68.58%	$53,076,189	$54,084,637	$4,094,109,000	$76,830,000	$4,017,279,000	$584,316,000	$584,316,000	**$54,084,637**	**$59,329,823**	**$84,599,776**
NEW HAMPSHIRE	50.00%	56.20%	54.65%	$183,727,990	$187,218,822	$2,548,220,000	$254,248,000	$2,293,972,000	$352,728,450	$352,728,450	**$187,218,822**	**$210,433,956**	**$374,437,644**
NEW JERSEY	50.00%	56.20%	54.65%	$738,763,183	$752,799,683	$16,303,602,000	$768,690,000	$15,534,912,000	$2,388,697,606	$2,388,697,606	**$752,799,683**	**$846,146,844**	**$1,505,599,366**
NEW YORK	50.00%	56.20%	54.65%	$1,843,321,726	$1,878,344,839	$85,670,762,000	$6,653,800,000	$79,016,962,000	$12,149,900,042	$12,149,900,042	**$1,878,344,839**	**$2,111,259,599**	**$3,756,689,678**
NORTH CAROLINA	67.03%	73.23%	71.68%	$338,540,021	$344,972,281	$15,044,922,000	$518,138,000	$14,526,784,000	$2,093,726,294	$2,093,726,294	**$344,972,281**	**$376,880,802**	**$514,653,560**
OHIO	63.02%	69.22%	67.67%	$466,209,777	$475,067,763	$24,415,845,000	$549,434,000	$23,866,411,000	$3,481,314,961	$3,481,314,961	**$475,067,763**	**$521,805,626**	**$753,836,501**
PENNSYLVANIA	52.25%	58.45%	56.90%	$644,086,735	$656,324,383	$36,038,894,000	$950,029,000	$35,088,865,000	$5,336,008,245	$5,336,008,245	**$656,324,383**	**$734,204,023**	**$1,256,123,221**
RHODE ISLAND	52.95%	59.15%	57.60%	$74,593,564	$76,010,842	$3,028,086,000	$143,891,000	$2,884,195,000	$437,183,242	$437,183,242	**$76,010,842**	**$84,911,073**	**$143,552,110**
SOUTH CAROLINA	70.70%	76.90%	75.35%	$375,836,803	$382,977,702	$6,494,872,000	$550,561,000	$5,944,311,000	$848,436,623	$848,436,623	**$382,977,702**	**$416,562,734**	**$541,694,062**
TENNESSEE /5	65.21%	71.41%	69.86%	na	na	na	na	na	na	na	**$53,100,000**	**$58,148,612**	**$81,429,229**
TEXAS	60.89%	67.09%	65.51%	$1,097,386,087	$1,118,236,423	$40,038,504,000	$1,581,367,000	$38,457,137,000	$5,649,191,092	$5,649,191,092	**$1,118,236,423**	**$1,232,098,565**	**$1,836,486,160**
VERMONT	53.86%	60.06%	58.51%	$25,820,851	$26,311,447	$1,684,745,000	$22,704,000	$1,662,041,000	$250,903,510	$250,903,510	**$26,311,447**	**$29,340,243**	**$48,851,554**
VIRGINIA	50.00%	56.20%	54.65%	$100,537,864	$102,448,083	$15,165,415,000	$43,703,000	$15,121,712,000	$2,325,162,656	$2,325,162,656	**$102,448,083**	**$115,151,645**	**$204,896,166**
WASHINGTON	50.00%	56.20%	54.65%	$212,304,760	$216,338,550	$12,952,363,000	$389,744,000	$12,562,619,000	$1,931,668,356	$1,931,668,356	**$216,338,550**	**$243,164,530**	**$432,677,100**

A	B1	B2	B3	C	D	E	F	G	H	I	J	K	L
STATE	FY 2020 FMAPs (Regular) /1	FY 2020 FMAPs (FFCRA) /2	FY 2020 FMAPs (Prorated) /3	Prior FY (2019) DSH Allotments	Prior FY (2019) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.9%	FY 2020 TC MAP Exp. Including DSH /4	FY 2020 TC DSH Expenditures /4	FY 2020 TC MAP EXP. Net Of DSH Col E - F	"12% Amount" =Col G x .12/(1-.12/Col B3) (In FS)	Greater of Col H Or Col C (12% Limit, FY 2019 Allotment)	FY 2020 DSH Allotment MIN Col I, Col D	FY 2020 DSH FS Allotment ARP Column B2 x L	FY 2020 DSH TC Allotment Column J / B1
WEST VIRGINIA	74.94%	81.14%	79.59%	$77,462,547	$78,934,335	$4,462,339,000	$73,034,000	$4,389,305,000	$620,230,422	$620,230,422	**$78,934,335**	**$85,464,798**	**$105,330,044**
TOTAL				**$11,976,133,633**	**$12,203,680,172**	**$585,901,750,000**	**$18,890,889,000**	**$567,010,861,000**	**$85,053,943,605**	**$85,053,943,605**	**$12,256,780,174**	**$13,592,801,492**	**$21,548,730,937**
LOW DSH STATES													
ALASKA	50.00%	56.20%	54.65%	$23,376,123	$23,820,269	$2,578,787,000	$84,911,000	$2,493,876,000	$383,466,326.10	$383,466,326	**$23,820,269**	**$26,773,982**	**$47,640,538**
ARKANSAS	71.42%	77.62%	76.07%	$49,504,631	$50,445,219	$7,197,105,000	$50,817,000	$7,146,288,000	$1,018,170,366	$1,018,170,366	**$50,445,219**	**$54,824,390**	**$70,631,782**
DELAWARE	57.86%	64.06%	62.51%	$10,389,387	$10,586,785	$2,371,937,000	$14,343,000	$2,357,594,000	$350,124,413	$350,124,413	**$10,586,785**	**$11,721,214**	**$18,297,243**
HAWAII	53.47%	59.67%	58.12%	$11,184,206	$11,396,706	$2,207,058,000	$0	$2,207,058,000	$333,757,704.15	$333,757,704	**$11,396,706**	**$12,718,187**	**$21,314,206**
IDAHO	70.34%	76.54%	74.99%	$18,863,567	$19,221,975	$2,267,117,000	$26,896,000	$2,240,221,000	$320,039,700.50	$320,039,701	**$19,221,975**	**$20,916,263**	**$27,327,232**
IOWA	61.20%	67.40%	65.85%	$45,193,531	$46,052,208	$5,493,516,000	$70,702,000	$5,422,814,000	$795,748,862	$795,748,862	**$46,052,208**	**$50,717,628**	**$75,248,706**
MINNESOTA	50.00%	56.20%	54.65%	$85,712,452	$87,340,989	$14,354,071,000	$71,920,000	$14,282,151,000	$2,196,069,080	$2,196,069,080	**$87,340,989**	**$98,171,272**	**$174,681,978**
MONTANA	64.78%	70.98%	69.43%	$13,026,074	$13,273,569	$1,968,264,000	$937,000	$1,967,327,000	$285,408,003	$285,408,003	**$13,273,569**	**$14,543,963**	**$20,490,227**
NEBRASKA	54.72%	60.92%	59.37%	$32,474,849	$33,091,871	$2,425,339,000	$43,305,000	$2,382,034,000	$358,255,500	$358,255,500	**$33,091,871**	**$36,841,315**	**$60,474,910**
NEW MEXICO	72.71%	78.91%	77.36%	$23,376,123	$23,820,269	$5,616,504,000	$32,444,000	$5,584,060,000	$793,114,226	$793,114,226	**$23,820,269**	**$25,851,429**	**$32,760,651**
NORTH DAKOTA	50.05%	56.25%	54.70%	$10,961,790	$11,170,064	$1,218,066,000	$2,255,000	$1,215,811,000	$186,898,909	$186,898,909	**$11,170,064**	**$12,553,768**	**$22,317,810**
OKLAHOMA	66.02%	72.22%	70.67%	$41,557,549	$42,347,142	$5,120,851,000	$43,975,000	$5,076,876,000	$733,832,269	$733,832,269	**$42,347,142**	**$46,324,002**	**$64,142,899**
OREGON	61.23%	67.43%	65.88%	$51,946,941	$52,933,933	$10,952,876,000	$57,888,000	$10,894,988,000	$1,508,578,640	$1,508,578,640	**$52,933,933**	**$58,293,894**	**$86,450,977**
SOUTH DAKOTA	57.62%	63.82%	62.27%	$12,674,763	$12,915,583	$1,001,570,000	$1,667,000	$999,903,000	$148,630,897	$148,630,897	**$12,915,583**	**$14,305,319**	**$22,415,104**
UTAH	68.19%	74.39%	72.84%	$22,513,467	$22,941,223	$3,151,948,000	$33,158,000	$3,118,790,000	$448,072,315	$448,072,315	**$22,941,223**	**$25,027,095**	**$33,643,090**
WISCONSIN	59.36%	65.56%	64.01%	$108,485,232	$110,546,451	$9,516,747,000	$102,783,000	$9,413,964,000	$1,390,319,944	$1,390,319,944	**$110,546,451**	**$122,092,745**	**$186,230,544**
WYOMING	50.00%	56.20%	54.65%	$259,735	$264,670	$618,014,000	$520,000	$617,494,000	$91,947,816	$91,947,816	**$264,670**	**$297,489**	**$529,340**
TOTAL LOW DSH STATES				**$561,500,420**	**$572,168,928**	**$78,059,770,000**	**$638,521,000**	**$77,421,249,000**	**$11,435,435,001**	**$11,435,435,001**	**$572,168,926**	**$631,973,955**	**$964,597,238**
TOTAL				**$12,537,634,053**	**$12,775,849,100**	**$663,961,520,000**	**$19,529,410,000**	**$644,432,110,000**	**$96,489,378,607**	**$96,489,378,607**	**$12,828,949,100**	**$14,224,775,447**	**$22,513,328,175**

FOOTNOTES:
/1 Regular FMAP as determined under section 1905(b) of the Act.
/2 Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.
/3 Prorated to reflect the FFCRA FMAP rate going into effect beginning January 1, 2020.
/4 Expenditures based on the amounts reported by States on the Form CMS-37.
/5 Tennessee's DSH allotment for FY 2020 determined under section 1923(f)(6)(A) of the Act.

Key to ADDENDUM 4: Preliminary DSH Allotments for FY 2021.

The Preliminary FY 2021 DSH Allotments for the NON-Low DSH States are presented in the top section of this addendum, and the Preliminary FY 2021 DSH Allotments for the Low-DSH States are presented in the bottom section of this addendum.	
Column	**Description**
Column A	**State.**
Column B1	**FY 2021 FMAPs.** This column contains the States' regular FY 2021 Federal Medical Assistance Percentages.
Column B2	**FY 2021 FMAPs.** This column contains the States' FFCRA FY2020 Federal Medical Assistance Percentages.
Column C	**Prior FY (2020) DSH Allotments** This column contains the States' prior preliminary FY 2020 DSH Allotments.
Column D	**Prior FY (2020) DSH Allotments (Col C) x (100 percent + Percentage Increase in CPIU): 101.5percent.** This column contains the amount in Column C increased by 1 plus the estimated percentage increase in the CPI-U for the prior FY (101.5 percent).
Column E	**FY 2021 TC MAP Exp. Including DSH.** This column contains the amount of the States' projected FY 2021 total computable (TC) medical assistance expenditures including DSH expenditures.
Column F	**FY 2021 TC DSH Expenditures.** This column contains the amount of the States' projected FY 2021 total computable DSH expenditures.
Column G	**FY 2021 TC MAP Exp. Net of DSH.** This column contains the amount of the States' projected FY 2021 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F.
Column H	**12 percent Amount.** This column contains the amount of the "12 percent limit" in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. This is calculated using the full FFCRA FMAP rate in Column B2.
Column I	**Greater of FY 2020 Allotment or 12 percent Limit.** This column contains the greater of the State's preliminary prior FY (FY 2020) DSH allotment or the amount of the 12 percent Limit, determined as the greater of the amount in Column C or Column H.
Column J	**FS FY 2021 Unadjusted DSH Allotment.** This column contains the States' preliminary FY 2021 DSH allotments, determined as the lesser of the amount in Column I or Column D. For States with "na" in Columns I or D, refer to the footnotes in the addendum.
Column K	**FS FY 2021 ARP-adjusted DSH Allotment.** This column contains the States' preliminary FY 2021 ARP DSH allotments, determined by multiplying the FMAP in Column B2 by Column L.
Column L	**TC FY 2021 DSH Allotment.** This column contains the States' preliminary TC FY 2021 DSH allotments, determined by dividing Column B1 by Column J.

ADDENDUM 4: PRELIMINARY DSH ALLOTMENTS FOR FISCAL YEAR: 2021

A	B1	B2	C	D	E	F	G	H	I	J	K	L
STATE	Regular FMAP (Regular) /1	FY 2021 FMAPs (FFCRA) /2	Prior FY (2020) DSH Allotments	Prior FY (2020) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.5%	FY 2021 TC MAP Exp. Including DSH /3	FY 2021 TC DSH Expenditures /3	FY 2021 TC MAP EXP. Net Of DSH Col E - F	"12% Amount" =Col G x .12/(1-.12/Col B2) (In FS)	Greater of Col H Or Col C (12% Limit, FY 2020 Allotment)	FY 2021 DSH Allotment MIN Col I, Col D	FY 2021 DSH FS Allotment ARP Column B2 x L	FY 2021 DSH TC Allotment Column J / B1
ALABAMA	72.58%	78.78%	$359,589,752	$364,983,598	$6,867,572,000	$503,820,000	$6,363,752,000	$900,874,003	$900,874,003	**$364,983,598**	**$396,161,585**	**$502,870,761**
ARIZONA	70.01%	76.21%	$118,401,505	$120,177,528	$16,967,662,000	$181,188,000	$16,786,474,000	$2,390,837,284	$2,390,837,284	**$120,177,528**	**$130,820,303**	**$171,657,660**
CALIFORNIA	50.00%	56.20%	$1,281,952,080	$1,301,181,361	$124,775,344,000	$0	$124,775,344,000	$ 9,038,120,361	$19,038,120,361	**$1,301,181,361**	**$1,462,527,850**	**$2,602,362,722**
COLORADO	50.00%	56.20%	$108,169,274	$109,791,813	$10,921,416,000	$209,834,000	$10,711,582,000	$1,634,364,457	$1,634,364,457	**$109,791,813**	**$123,405,998**	**$219,583,626**
CONNECTICUT	50.00%	56.20%	$233,879,514	$237,387,707	$8,901,064,000	$115,798,000	$8,785,266,000	$1,340,448,731	$1,340,448,731	**$237,387,707**	**$266,823,783**	**$474,775,414**
DISTRICT OF COLUMBIA	70.00%	76.20%	$71,625,601	$72,699,985	$2,904,290,000	$78,992,000	$2,825,298,000	$402,406,930	$402,406,930	**$72,699,985**	**$79,139,127**	**$103,857,121**
FLORIDA	61.96%	68.16%	$233,879,514	$237,387,707	$28,543,632,000	$329,926,000	$28,213,706,000	$4,109,073,079	$4,109,073,079	**$237,387,707**	**$261,141,803**	**$383,130,579**
GEORGIA	67.03%	73.23%	$314,275,596	$318,989,730	$12,172,165,000	$438,154,000	$11,734,011,000	$1,684,040,422	$1,684,040,422	**$318,989,730**	**$348,494,971**	**$475,890,989**
ILLINOIS	50.96%	57.16%	$251,420,477	$255,191,784	$20,031,984,000	$442,416,000	$19,589,568,000	$2,975,393,375	$2,975,393,375	**$255,191,784**	**$286,239,450**	**$500,768,807**
INDIANA	65.83%	72.03%	$249,958,731	$253,708,112	$15,479,936,000	$315,700,000	$15,164,236,000	$2,183,468,104	$2,183,468,104	**$253,708,112**	**$277,602,845**	**$385,398,925**
KANSAS	59.68%	65.88%	$48,237,649	$48,961,214	$4,398,757,000	$81,538,000	$4,317,219,000	$633,448,525	$633,448,525	**$48,961,214**	**$54,047,667**	**$82,039,568**
KENTUCKY	72.05%	78.25%	$169,562,648	$172,106,088	$12,283,957,000	$237,440,000	$12,046,517,000	$1,707,423,315	$1,707,423,315	**$172,106,088**	**$186,916,050**	**$238,870,351**
LOUISIANA	67.42%	73.62%	$801,812,898	$813,840,091	$16,186,646,000	$427,001,000	$15,759,645,000	$2,259,445,112	$2,259,445,112	**$813,840,091**	**$888,681,511**	**$1,207,119,684**
MAINE	63.69%	69.89%	$122,786,743	$124,628,544	$3,444,078,000	$53,596,000	$3,390,482,000	$491,195,274	$491,195,274	**$124,628,544**	**$136,760,699**	**$195,679,925**
MARYLAND	50.00%	56.20%	$89,166,566	$90,504,064	$12,101,040,000	$97,761,000	$12,003,279,000	$1,831,450,533	$1,831,450,533	**$90,504,064**	**$101,726,568**	**$181,008,128**
MASSACHUSETTS	50.00%	56.20%	$356,666,257	$362,016,251	$21,298,109,000	$0	$21,298,109,000	$3,249,648,124	$3,249,648,124	**$362,016,251**	**$406,906,266**	**$724,032,502**
MICHIGAN	64.08%	70.28%	$309,890,355	$314,538,710	$20,773,999,000	$304,004,000	$20,469,995,000	$2,962,178,274	$2,962,178,274	**$314,538,710**	**$344,971,606**	**$490,853,168**
MISSISSIPPI	77.76%	83.96%	$178,333,128	$181,008,125	$6,057,710,000	$233,898,000	$5,823,812,000	$815,398,425	$815,398,425	**$181,008,125**	**$195,440,357**	**$232,777,939**
MISSOURI	64.96%	71.16%	$554,002,096	$562,312,127	$12,519,611,000	$869,562,000	$11,650,049,000	$1,681,577,052	$1,681,577,052	**$562,312,127**	**$615,981,080**	**$865,628,274**
NEVADA	63.30%	69.50%	$54,895,907	$54,895,907	$4,839,536,000	$107,206,000	$4,732,330,000	$686,393,603	$686,393,603	**$54,895,907**	**$60,272,757**	**$86,723,392**
NEW HAMPSHIRE	50.00%	56.20%	$187,218,822	$190,027,104	$2,570,307,000	$269,947,000	$2,300,360,000	$350,987,055	$350,987,055	**$190,027,104**	**$213,590,465**	**$380,054,208**
NEW JERSEY	50.00%	56.20%	$752,799,683	$764,091,678	$17,987,333,000	$1,000,685,000	$16,986,648,000	$2,591,808,917	$2,591,808,917	**$764,091,678**	**$858,839,046**	**$1,528,183,356**
NEW YORK	50.00%	56.20%	$1,878,344,839	$1,906,520,012	$82,386,449,000	$3,236,002,000	$79,150,447,000	$ 2,076,710,737	$12,076,710,737	**$1,906,520,012**	**$2,142,928,493**	**$3,813,040,024**
NORTH CAROLINA	67.40%	73.60%	$344,972,281	$350,146,865	$16,163,140,000	$459,500,000	$15,703,640,000	$2,251,534,878	$2,251,534,878	**$350,146,865**	**$382,356,221**	**$519,505,734**
OHIO	63.63%	69.83%	$475,067,763	$482,193,779	$30,995,900,000	$540,309,000	$30,455,591,000	$4,413,032,515	$4,413,032,515	**$482,193,779**	**$529,177,928**	**$757,808,862**
PENNSYLVANIA	52.20%	58.40%	$656,324,383	$666,169,249	$36,817,986,000	$869,027,000	$35,948,959,000	$5,429,532,428	$5,429,532,428	**$666,169,249**	**$745,292,800**	**$1,276,186,301**
RHODE ISLAND	54.09%	60.29%	$76,010,842	$77,151,005	$3,059,009,000	$143,552,000	$2,915,457,000	$436,793,297	$436,793,297	**$77,151,005**	**$85,994,344**	**$142,634,507**
SOUTH CAROLINA	70.63%	76.83%	$382,977,702	$388,722,368	$7,349,836,000	$529,979,000	$6,819,857,000	$969,865,087	$969,865,087	**$388,722,368**	**$422,844,960**	**$550,364,389**
TENNESSEE /4	66.10%	72.30%	na	na	na	na	na	na	na	**$53,100,000**	**$58,080,635**	**$80,332,829**
TEXAS	61.81%	68.01%	$1,118,236,423	$1,135,009,969	$46,698,497,000	$1,449,861,000	$45,248,636,000	$6,593,164,937	$6,593,164,937	**$1,135,009,969**	**$1,248,859,861**	**$1,836,288,576**
VERMONT	54.57%	60.77%	$26,311,447	$26,706,119	$1,678,391,000	$22,704,000	$1,655,687,000	$247,568,831	$247,568,831	**$26,706,119**	**$29,740,349**	**$48,939,196**
VIRGINIA	50.00%	56.20%	$102,448,083	$103,984,804	$16,904,519,000	$67,609,000	$16,836,910,000	$2,568,962,014	$2,568,962,014	**$103,984,804**	**$116,878,920**	**$207,969,608**
WASHINGTON	50.00%	56.20%	$216,338,550	$219,583,628	$14,317,285,000	$440,334,000	$13,876,951,000	$2,117,333,881	$2,117,333,881	**$219,583,628**	**$246,811,998**	**$439,167,256**

A	B1	B2	C	D	E	F	G	H	I	J	K	L
STATE	Regular FMAP (Regular) /1	FY 2021 FMAPs (FFCRA) /2	Prior FY (2020) DSH Allotments	Prior FY (2020) DSH Allotment (Col C) x 100% + Pct Increase in CPIU: 101.5%	FY 2021 TC MAP Exp. Including DSH /3	FY 2021 TC DSH Expenditures /3	FY 2021 TC MAP EXP. Net Of DSH Col E - F	"12% Amount" =Col G x .12/(1-.12/Col B2) (In FS)	Greater of Col H Or Col C (12% Limit, FY 2020 Allotment)	FY 2021 DSH Allotment MIN Col I, Col D	FY 2021 DSH FS Allotment ARP Column B2 x L	FY 2021 DSH TC Allotment Column J / B1
WEST VIRGINIA	74.99%	81.19%	$78,934,335	$80,118,350	$4,263,098,000	$73,918,000	$4,189,180,000	$589,887,887	$589,887,887	**$80,118,350**	**$86,742,350**	**$106,838,712**
TOTAL			**$12,203,680,174**	**$12,386,735,377**	**$642,660,258,000**	**$14,131,261,000**	**$628,528,997,000**	**$93,614,367,450**	**$93,614,367,450**	**$12,439,835,376**	**$13,792,200,648**	**$21,812,343,093**
LOW DSH STATES												
ALASKA	50.00%	56.20%	$23,820,269	$24,177,573	$2,215,593,000	$27,171,000	$2,188,422,000	$333,907,646.33	$333,907,646	**$24,177,573**	**$27,175,592**	**$48,355,146**
ARKANSAS	71.23%	77.43%	$50,445,219	$51,201,897	$7,915,250,000	$25,000,000	$7,890,250,000	$1,120,480,619	$1,120,480,619	**$51,201,897**	**$55,658,611**	**$71,882,489**
DELAWARE	57.74%	63.94%	$10,586,785	$10,745,587	$2,594,287,000	$18,315,000	$2,575,972,000	$380,533,653	$380,533,653	**$10,745,587**	**$11,899,426**	**$18,610,300**
HAWAII	53.02%	59.22%	$11,396,706	$11,567,657	$2,481,890,000	$0	$2,481,890,000	$373,513,407.37	$373,513,407	**$11,567,657**	**$12,920,344**	**$21,817,535**
IDAHO	70.41%	76.61%	$19,221,975	$19,510,305	$2,899,439,000	$25,091,000	$2,874,348,000	$408,983,996.81	$408,983,997	**$19,510,305**	**$21,228,298**	**$27,709,565**
IOWA	61.75%	67.95%	$46,052,208	$46,742,991	$5,924,157,000	$70,703,000	$5,853,454,000	$853,066,379	$853,066,379	**$46,742,991**	**$51,436,214**	**$75,697,151**
MINNESOTA	50.00%	56.20%	$87,340,989	$88,651,104	$15,721,788,000	$70,882,000	$15,650,906,000	$2,388,002,490	$2,388,002,490	**$88,651,104**	**$99,643,841**	**$177,302,208**
MONTANA	65.60%	71.80%	$13,273,569	$13,472,673	$2,178,847,000	$1,830,000	$2,177,017,000	$313,665,192	$313,665,192	**$13,472,673**	**$14,746,005**	**$20,537,611**
NEBRASKA	56.47%	62.67%	$33,091,871	$33,588,249	$3,012,499,000	$41,689,000	$2,970,810,000	$440,925,193	$440,925,193	**$33,588,249**	**$37,275,997**	**$59,479,811**
NEW MEXICO	73.46%	79.66%	$23,820,269	$24,177,573	$7,111,378,000	$32,760,000	$7,078,618,000	$1,000,087,573	$1,000,087,573	**$24,177,573**	**$26,218,152**	**$32,912,569**
NORTH DAKOTA	52.40%	58.60%	$11,170,064	$11,337,615	$1,314,604,000	$1,972,000	$1,312,632,000	$198,077,859	$198,077,859	**$11,337,615**	**$12,679,089**	**$21,636,670**
OKLAHOMA	67.99%	74.19%	$42,347,142	$42,982,349	$6,374,062,000	$62,367,000	$6,311,695,000	$903,549,739	$903,549,739	**$42,982,349**	**$46,901,904**	**$63,218,634**
OREGON	60.84%	67.04%	$52,933,933	$53,727,942	$11,525,613,000	$100,245,000	$11,425,368,000	$1,669,963,672	$1,669,963,672	**$53,727,942**	**$59,203,176**	**$88,310,227**
SOUTH DAKOTA	58.28%	64.48%	$12,915,583	$13,109,317	$972,311,000	$1,542,000	$970,769,000	$143,129,234	$143,129,234	**$13,109,317**	**$14,503,925**	**$22,493,681**
UTAH	67.52%	73.72%	$22,941,223	$23,285,341	$3,674,282,000	$32,072,000	$3,642,210,000	$522,042,232	$522,042,232	**$23,285,341**	**$25,423,509**	**$34,486,583**
WISCONSIN	59.37%	65.57%	$110,546,451	$112,204,648	$9,841,111,000	$104,142,000	$9,736,969,000	$1,430,172,986	$1,430,172,986	**$112,204,648**	**$123,922,162**	**$188,992,164**
WYOMING	50.00%	56.20%	$264,670	$268,640	$622,790,000	$170,000	$622,320,000	$94,953,079	$94,953,079	**$268,640**	**$301,951**	**$537,280**
TOTAL LOW DSH STATES			**$572,168,926**	**$580,751,460**	**$86,379,901,000**	**$616,251,000**	**$85,763,650,000**	**$12,575,054,950**	**$12,575,054,950**	**$580,751,461**	**$641,138,198**	**$973,979,623**
TOTAL			**$12,775,849,100**	**$12,967,486,837**	**$729,040,159,000**	**$14,747,512,000**	**$714,292,647,000**	**$106,189,422,400**	**$106,189,422,400**	**$13,020,586,837**	**$14,433,338,845**	**$22,786,322,716**

FOOTNOTES:

/1 Regular FMAP as determined under section 1905(b) of the Act.

/2 Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.

/3 Expenditures based on the amounts reported by States on the Form CMS-37.

/4 Tennessee's DSH allotment for FY 2021 determined under section 1923(f)(6)(A) of the Act.

Key to ADDENDUM 5: Final IMD DSH Limits for FY 2018

The final FY 2018 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the preliminary FY 2018 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum.

Column	Description
Column A	**State.**
Column B	**Inpatient Hospital Services FY 95 DSH Total Computable.** This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column C	**IMD and Mental Health Services FY 95 DSH Total Computable** This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column D	**Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C** This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	**Applicable Percentage, Col. C/D.** This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent.
Column F	**FY 2018 Federal Share DSH Allotment.** This column contains the States' final FY 2018 DSH allotments from Addendum 1, Column J.
Column G	**FY 2018 FMAP.**
Column H	**FY 2018 DSH Allotments in Total Computable, Col. F/G.** This column contains States' FY 2018 total computable DSH allotment (determined as Column F/Column G).
Column I	**Applicable Percentage Applied to FY 2018 Allotments in TC, Col E x Col H.** This column contains the applicable percentage of FY 2018 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H).
Column J	**FY 2018 TC IMD DSH Limit. Lesser of Col. I or C** This column contains the total computable FY 2018 TC IMD DSH limit equal to the lesser of the amount in Column I or Column C.
Column K	**FY 2018 IMD DSH Limit in Federal Share, Col. G x J.** This column contains the FY 2018 Federal Share IMD DSH limit determined by converting the total computable FY 2018 IMD DSH limit from Column J into a federal share amount by multiplying it by the FY 2018 FMAP in Column G.

ADDENDUM 5: FINAL IMD DSH LIMIT FOR FY: 2018

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2018 Allotment In FS	FY 2018 FMAPs	FY 2018 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2018 Allotments in TC Col E x Col H	FY 2018 TC IMD Limit (Lesser Of Col I or Col C)	FY 2018 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$344,614,197	71.44%	$482,382,695	$5,144,127	$4,451,770	**$3,180,344**	N/A
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	$113,470,529	69.89%	$162,355,886	$37,772,938	$28,474,900	**$19,901,108**	N/A

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2018 Allotment In FS	FY 2018 FMAPs	FY 2018 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2018 Allotments in TC Col E x Col H	FY 2018 TC IMD Limit (Lesser Of Col I or Col C)	FY 2018 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
CALIFORNIA	$2,189,879,543	$1,555,919	$2,191,435,462	0.07%	$1,228,563,619	50.00%	$2,457,127,238	$1,744,560	$1,555,919	**$777,960**	N/A
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$103,664,433	50.00%	$207,328,866	$706,691	$594,776	**$297,388**	N/A
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	$224,139,315	50.00%	$448,278,630	$115,731,537	$105,573,725	**$52,786,863**	N/A
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	$68,642,665	70.00%	$98,060,950	$13,929,229	$6,545,136	**$4,581,595**	N/A
FLORIDA	$184,468,014	$149,714,986	$334,183,000	33.00%	$224,139,315	61.79%	$362,743,672	$119,705,412	$119,705,412	**$73,965,974**	N/A
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$301,187,205	68.50%	$439,689,350	$0	$0	**$0**	N/A
ILLINOIS	$315,868,508	$89,408,276	$405,276,784	22.06%	$240,949,764	50.74%	$474,871,431	$104,761,579	$89,408,276	**$45,365,759**	N/A
INDIANA	$79,960,783	$153,566,302	$233,527,085	33.00%	$239,548,895	65.59%	$365,221,673	$120,523,152	$120,523,152	**$79,051,135**	N/A
KANSAS	$11,587,208	$76,663,508	$88,250,716	33.00%	$46,228,733	54.74%	$84,451,467	$27,868,984	$27,868,984	**$15,255,482**	N/A
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	19.08%	$162,501,004	71.17%	$228,327,953	$43,563,761	$37,443,073	**$26,648,235**	N/A
LOUISIANA	$1,078,512,169	$132,917,149	$1,211,429,318	10.97%	$768,420,420	63.69%	$1,206,500,895	$132,376,406	$132,376,406	**$84,310,533**	N/A
MAINE	$99,957,958	$60,958,342	$160,916,300	33.00%	$117,673,139	64.34%	$182,892,662	$60,354,579	$60,354,579	**$38,832,136**	N/A
MARYLAND	$22,226,467	$120,873,531	$143,099,998	33.00%	$85,453,115	50.00%	$170,906,230	$56,399,056	$56,399,056	**$28,199,528**	N/A
MASSACHUSETTS	$469,653,946	$105,635,054	$575,289,000	18.36%	$341,812,455	50.00%	$683,624,910	$125,527,786	$105,635,054	**$52,817,527**	N/A
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	33.00%	$296,984,593	64.78%	$458,451,054	$151,288,848	$151,288,848	**$98,004,916**	N/A
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	$170,906,227	75.65%	$225,917,022	$0	$0	**$0**	N/A
MISSOURI	$521,946,524	$207,234,618	$729,181,142	28.42%	$530,930,002	64.61%	$821,745,863	$233,541,681	$207,234,618	**$133,894,287**	N/A
NEVADA	$73,560,000	$0	$73,560,000	0.00%	$51,832,216	65.75%	$78,832,268	$0	$0	**$0**	N/A
NEW HAMPSHIRE	$92,675,916	$94,753,948	$187,429,864	33.00%	$179,421,865	50.00%	$358,843,730	$118,418,431	$94,753,948	**$47,376,974**	N/A
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$721,448,421	50.00%	$1,442,896,842	$471,293,833	$357,370,461	**$178,685,231**	N/A
NEW YORK	$2,418,869,368	$605,000,000	$3,023,869,368	20.01%	$1,800,118,873	50.00%	$3,600,237,746	$720,316,777	$605,000,000	**$302,500,000**	N/A
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	33.00%	$330,605,489	67.61%	$488,989,039	$161,366,383	$161,366,383	**$109,099,811**	N/A
OHIO	$535,731,956	$93,432,758	$629,164,714	14.85%	$455,282,985	62.78%	$725,203,863	$107,694,846	$93,432,758	**$58,657,085**	N/A
PENNSYLVANIA	$388,207,319	$579,199,682	$967,407,001	33.00%	$628,990,952	51.82%	$1,213,799,599	$400,553,868	$400,553,868	**$207,567,014**	N/A
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	$72,845,277	51.45%	$141,584,601	$3,061,255	$2,397,833	**$1,233,685**	N/A
SOUTH CAROLINA	$366,681,364	$72,076,341	$438,757,705	16.43%	$367,028,128	71.58%	$512,752,344	$84,231,712	$72,076,341	**$51,592,245**	N/A
TENNESSEE	$0	$0	$0	0.00%	$53,100,000	65.82%	$80,674,567	$0	$0	**$0**	N/A
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$1,071,666,101	56.88%	$1,884,082,456	$364,249,284	$292,513,592	**$166,381,731**	N/A
VERMONT	$19,979,252	$9,071,297	$29,050,549	31.23%	$25,215,675	53.47%	$47,158,547	$14,725,683	$9,071,297	**$4,850,423**	N/A
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.67%	$98,181,508	50.00%	$196,363,016	$11,130,373	$7,770,268	**$3,885,134**	N/A
WASHINGTON	$171,725,815	$163,836,435	$335,562,250	33.00%	$207,328,867	50.00%	$414,657,734	$136,837,052	$136,837,052	**$68,418,526**	N/A
WEST VIRGINIA	$66,962,606	$18,887,045	$85,849,651	22.00%	$75,647,019	73.24%	$103,286,481	$22,723,172	$18,887,045	**$13,832,872**	N/A

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2018 Allotment In FS	FY 2018 FMAPs	FY 2018 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2018 Allotments in TC Col E x Col H	FY 2018 TC IMD Limit (Lesser Of Col I or Col C)	FY 2018 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
TOTAL	**$13,402,460,846**	**$4,118,758,904**	**$17,521,219,750**		**$11,748,543,001**		**$20,850,241,279**	**$3,967,542,995**	**$3,507,464,529**	**$1,971,951,501**	
LOW DSH STATES											
ALASKA	$2,506,827	$17,611,765	$20,118,592	33.00%	$22,828,245	50.00%	$45,656,490	$15,066,642	$15,066,642	**$7,533,321**	**LOW DSH**
ARKANSAS	$2,422,649	$819,351	$3,242,000	25.27%	$48,344,366	70.87%	$68,215,558	$17,240,125	$819,351	**$580,674**	**LOW DSH**
DELAWARE	$0	$7,069,000	$7,069,000	33.00%	$10,145,886	56.43%	$17,979,596	$5,933,267	$5,933,267	**$3,348,142**	**LOW DSH**
HAWAII	$0	$0	$0	0.00%	$10,922,076	54.78%	$19,938,072	$0	$0	**$0**	**LOW DSH**
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$18,421,452	71.17%	$25,883,732	$0	$0	**$0**	**LOW DSH**
IOWA	$12,011,250	$0	$12,011,250	0.00%	$44,134,308	58.48%	$75,469,063	$0	$0	**$0**	**LOW DSH**
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	$83,703,566	50.00%	$167,407,132	$29,836,551	$5,257,214	**$2,628,607**	**LOW DSH**
MONTANA	$237,048	$0	$237,048	0.00%	$12,720,775	65.38%	$19,456,676	$0	$0	**$0**	**LOW DSH**
NEBRASKA	$6,449,102	$1,811,337	$8,260,439	21.93%	$31,713,720	52.55%	$60,349,610	$13,233,374	$1,811,337	**$951,858**	**LOW DSH**
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	$22,828,245	72.16%	$31,635,595	$1,195,040	$254,786	**$183,854**	**LOW DSH**
NORTH DAKOTA	$214,523	$988,478	$1,203,001	33.00%	$10,704,873	50.00%	$21,409,746	$7,065,216	$988,478	**$494,239**	**LOW DSH**
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	$40,583,544	58.57%	$69,290,668	$9,736,978	$3,273,248	**$1,917,141**	**LOW DSH**
OREGON	$11,437,908	$19,975,092	$31,413,000	33.00%	$50,729,435	63.62%	$79,738,188	$26,313,602	$19,975,092	**$12,708,154**	**LOW DSH**
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	33.00%	$12,377,698	55.34%	$22,366,639	$7,380,991	$751,299	**$415,769**	**LOW DSH**
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	$21,985,808	70.26%	$31,292,069	$6,419,456	$934,586	**$656,640**	**LOW DSH**
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	33.00%	$105,942,609	58.77%	$180,266,478	$59,487,938	$4,492,011	**$2,639,955**	**LOW DSH**
WYOMING	$0	$0	$0	0.00%	$253,647	50.00%	$507,294	$0	$0	**$0**	**LOW DSH**
TOTAL LOW DSH STATES	**$98,662,480**	**$63,238,167**	**$161,900,647**		**$548,340,253**		**$936,862,605**	**$198,909,179**	**$59,557,310**	**$34,058,354**	
TOTAL	**$13,501,123,326**	**$4,181,997,071**	**$17,683,120,397**		**$12,296,883,254**		**$21,787,103,884**	**$4,166,452,175**	**$3,567,021,839**	**$2,006,009,855**	

FOOTNOTES:

*** Tennessee's DSH allotment for FY 2018, determined under section 1923(f)(6)(A) of the Act, is $53,100,000.**

Key to ADDENDUM 6: Final IMD DSH Limits for FY 2019

The final FY 2019 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the final FY 2019 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum.	
Column	**Description**
Column A	**State.**
Column B	**Inpatient Hospital Services FY 95 DSH Total Computable.** This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column C	**IMD and Mental Health Services FY 95 DSH Total Computable** This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column D	**Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C** This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	**Applicable Percentage, Col. C/D.** This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent.
Column F	**FY 2019 Federal Share DSH Allotment.** This column contains the States' final FY 2019 DSH allotments from Addendum 2, Column J.
Column G	**FY 2019 FMAP.**
Column H	**FY 2019 DSH Allotments in Total Computable, Col. F/G.** This column contains States' FY 2019 total computable DSH allotment (determined as Column F/Column G).
Column I	**Applicable Percentage Applied to FY 2019 Allotments in TC, Col E x Col H.** This column contains the applicable percentage of FY 2019 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H).
Column J	**FY 2019 TC IMD DSH Limit. Lesser of Col. I or C.** This column contains the total computable FY 2019 TC IMD DSH Limit equal to the lesser of the amount in Column I or Column C.
Column K	**FY 2019 IMD DSH Limit in Federal Share, Col. G x J.** This column contains the FY 2019 Federal Share IMD DSH limit determined by converting the total computable FY 2019 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2019 FMAP in Column G.

ADDENDUM 6: FINAL IMD DSH LIMIT FOR FISCAL YEAR: 2019

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2019 Allotment In FS	FY 2019 FMAPs	FY 2019 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2019 Allotments in TC Col E x Col H	FY 2019 TC IMD Limit (Lesser Of Col I or Col C)	FY 2019 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$352,884,938	71.88%	$490,936,196	$5,235,341	$4,451,770	**$3,199,932**	N/A
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	$116,193,822	69.81%	$166,442,948	$38,723,814	$28,474,900	**$19,878,328**	N/A
CALIFORNIA	$2,189,879,543	$1,555,919	$2,191,435,462	0.07%	$1,258,049,146	50.00%	$2,516,098,292	$1,786,430	$1,555,919	**$777,960**	N/A
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$106,152,379	50.00%	$212,304,758	$723,652	$594,776	**$297,388**	N/A
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	$229,518,659	50.00%	$459,037,318	$118,509,095	$105,573,725	**$52,786,863**	N/A
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	$70,290,089	70.00%	$100,414,413	$14,263,531	$6,545,136	**$4,581,595**	N/A
FLORIDA	$184,468,014	$149,714,986	$334,183,000	33.00%	$229,518,659	60.87%	$377,063,675	$124,431,013	$124,431,013	**$75,741,157**	N/A
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$308,415,698	67.62%	$456,101,298	$0	$0	**$0**	N/A
ILLINOIS	$315,868,508	$89,408,276	$405,276,784	22.06%	$246,732,558	50.31%	$490,424,484	$108,192,745	$89,408,276	**$44,981,304**	N/A
INDIANA	$79,960,783	$153,566,302	$233,527,085	33.00%	$245,298,068	65.96%	$371,889,127	$122,723,412	$122,723,412	**$80,948,362**	N/A
KANSAS	$11,587,208	$76,663,508	$88,250,716	33.00%	$47,338,223	57.10%	$82,904,068	$27,358,343	$27,358,343	**$15,621,614**	N/A
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	19.08%	$166,401,028	71.67%	$232,176,682	$44,298,078	$37,443,073	**$26,835,450**	N/A
LOUISIANA	$1,078,512,169	$132,917,149	$1,211,429,318	10.97%	$786,862,510	65.00%	$1,210,557,708	$132,821,517	$132,821,517	**$86,333,986**	N/A
MAINE	$99,957,958	$60,958,342	$160,916,300	33.00%	$120,497,294	64.52%	$186,759,600	$61,630,668	$60,958,342	**$39,330,322**	N/A
MARYLAND	$22,226,467	$120,873,531	$143,099,998	33.00%	$87,503,990	50.00%	$175,007,980	$57,752,633	$57,752,633	**$28,876,317**	N/A
MASSACHUSETTS	$469,653,946	$105,635,054	$575,289,000	18.36%	$350,015,954	50.00%	$700,031,908	$128,540,453	$105,635,054	**$52,817,527**	N/A
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	33.00%	$304,112,223	64.45%	$471,857,600	$155,713,008	$155,713,008	**$100,357,034**	N/A
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	$175,007,976	76.39%	$229,098,018	$0	$0	**$0**	N/A
MISSOURI	$521,946,524	$207,234,618	$729,181,142	28.42%	$543,672,322	65.40%	$831,303,245	$236,257,907	$207,234,618	**$135,531,440**	N/A
NEVADA	$73,560,000	$0	$73,560,000	0.00%	$53,076,189	64.87%	$81,819,314	$0	$0	**$0**	N/A
NEW HAMPSHIRE	$92,675,916	$94,753,948	$187,429,864	33.00%	$183,727,990	50.00%	$367,455,980	$121,260,473	$94,753,948	**$47,376,974**	N/A
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$738,763,183	50.00%	$1,477,526,366	$482,604,885	$357,370,461	**$178,685,231**	N/A
NEW YORK	$2,418,869,368	$605,000,000	$3,023,869,368	20.01%	$1,843,321,726	50.00%	$3,686,643,452	$737,604,379	$605,000,000	**$302,500,000**	N/A
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	33.00%	$338,540,021	67.16%	$504,079,841	$166,346,347	$166,346,347	**$111,718,207**	N/A
OHIO	$535,731,956	$93,432,758	$629,164,714	14.85%	$466,209,777	63.09%	$738,959,862	$109,737,651	$93,432,758	**$58,946,727**	N/A
PENNSYLVANIA	$388,207,319	$579,199,682	$967,407,001	33.00%	$644,086,735	52.25%	$1,232,701,885	$406,791,622	$406,791,622	**$212,548,623**	N/A
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	$74,593,564	52.57%	$141,893,787	$3,067,940	$2,397,833	**$1,260,541**	N/A
SOUTH CAROLINA	$366,681,364	$72,076,341	$438,757,705	16.43%	$375,836,803	71.22%	$527,712,445	$86,689,263	$72,076,341	**$51,332,770**	N/A
TENNESSEE*	$0	$0	$0	0.00%	$53,100,000	65.87%	$80,613,329	$0	$0	**$0**	N/A
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$1,097,386,087	58.19%	$1,885,867,137	$364,594,316	$292,513,592	**$170,213,659**	N/A
VERMONT	$19,979,252	$9,071,297	$29,050,549	31.23%	$25,820,851	53.89%	$47,913,993	$14,961,578	$9,071,297	**$4,888,522**	N/A

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2019 Allotment In FS	FY 2019 FMAPs	FY 2019 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2019 Allotments in TC Col E x Col H	FY 2019 TC IMD Limit (Lesser Of Col I or Col C)	FY 2019 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.67%	$100,537,864	50.00%	$201,075,728	$11,397,502	$7,770,268	**$3,885,134**	N/A
WASHINGTON	$171,725,815	$163,836,435	$335,562,250	33.00%	$212,304,760	50.00%	$424,609,520	$140,121,142	$140,121,142	**$70,060,571**	N/A
WEST VIRGINIA	$66,962,606	$18,887,045	$85,849,651	22.00%	$77,462,547	74.34%	$104,200,359	$22,924,227	$18,887,045	**$14,040,629**	N/A
TOTAL	**$13,402,460,846**	**$4,118,758,904**	**$17,521,219,750**		**$12,029,233,633**		**$21,263,482,317**	**$4,047,062,963**	**$3,535,208,168**	**$1,996,354,167**	
LOW DSH STATES											
ALASKA	$2,506,827	$17,611,765	$20,118,592	33.00%	$23,376,123	50.00%	$46,752,246	$15,428,241	$15,428,241	**$7,714,121**	LOW DSH
ARKANSAS	$2,422,649	$819,351	$3,242,000	25.27%	$49,504,631	70.51%	$70,209,376	$17,744,023	$819,351	**$577,724**	LOW DSH
DELAWARE	$0	$7,069,000	$7,069,000	33.00%	$10,389,387	57.55%	$18,052,801	$5,957,424	$5,957,424	**$3,428,498**	LOW DSH
HAWAII	$0	$0	$0	0.00%	$11,184,206	53.92%	$20,742,222	$0	$0	**$0**	LOW DSH
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$18,863,567	71.13%	$26,519,847	$0	$0	**$0**	LOW DSH
IOWA	$12,011,250	$0	$12,011,250	0.00%	$45,193,531	59.93%	$75,410,531	$0	$0	**$0**	LOW DSH
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	$85,712,452	50.00%	$171,424,904	$30,552,628	$5,257,214	**$2,628,607**	LOW DSH
MONTANA	$237,048	$0	$237,048	0.00%	$13,026,074	65.54%	$19,874,998	$0	$0	**$0**	LOW DSH
NEBRASKA	$6,449,102	$1,811,337	$8,260,439	21.93%	$32,474,849	52.58%	$61,762,741	$13,543,244	$1,811,337	**$952,401**	LOW DSH
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	$23,376,123	72.26%	$32,350,018	$1,222,027	$254,786	**$184,108**	LOW DSH
NORTH DAKOTA	$214,523	$988,478	$1,203,001	33.00%	$10,961,790	50.00%	$21,923,580	$7,234,781	$988,478	**$494,239**	LOW DSH
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	$41,557,549	62.38%	$66,619,989	$9,361,684	$3,273,248	**$2,041,852**	LOW DSH
OREGON	$11,437,908	$19,975,092	$31,413,000	33.00%	$51,946,941	62.56%	$83,035,392	$27,401,679	$19,975,092	**$12,496,418**	LOW DSH
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	33.00%	$12,674,763	56.71%	$22,350,138	$7,375,545	$751,299	**$426,062**	LOW DSH
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	$22,513,467	69.71%	$32,295,893	$6,625,387	$934,586	**$651,500**	LOW DSH
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	33.00%	$108,485,232	59.37%	$182,727,357	$60,300,028	$4,492,011	**$2,666,907**	LOW DSH
WYOMING	$0	$0	$0	0.00%	$259,735	50.00%	$519,470	$0	$0	**$0**	LOW DSH
TOTAL LOW DSH STATES	**$98,662,480**	**$63,238,167**	**$161,900,647**		**$561,500,420**		**$952,571,501**	**$202,746,693**	**$59,943,068**	**$34,262,437**	
TOTAL	**$13,501,123,326**	**$4,181,997,071**	**$17,683,120,397**		**$12,590,734,053**		**$22,216,053,818**	**$4,249,809,656**	**$3,595,151,236**	**$2,030,616,604**	

FOOTNOTES:

*** Tennessee's DSH allotment for FY 2019, determined under section 1923(f)(6)(A) of the Act, is $53,100,000.**

Key to ADDENDUM 7: Preliminary IMD DSH Limits for FY 2020

The preliminary FY 2020 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the preliminary FY 2020 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum.	
Column	**Description**
Column A	**State.**
Column B	**Inpatient Hospital Services FY 95 DSH Total Computable.** This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column C	**IMD and Mental Health Services FY 95 DSH Total Computable** This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column D	**Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C** This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	**Applicable Percentage, Col. C/D.** This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent.
Column F	**FY 2020 Federal Share DSH Allotment.** This column contains the States' preliminary FY 2020 DSH allotments from Addendum 3, Column J.
Column G	**FY 2020 FMAP.** This column contains the full FFCRA FMAP rate from Addendum 3, Column B2.
Column H	**FY 2020 DSH Allotments in Total Computable, Col. F/G.** This column contains States' FY 2020 total computable DSH allotment (determined as Column F/Column G).
Column I	**Applicable Percentage Applied to FY 2020 Allotments in TC, Col E x Col H.** This column contains the applicable percentage of FY 2020 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H).
Column J	**FY 2020 TC IMD DSH Limit. Lesser of Col. I or C.** This column contains the total computable FY 2020 TC IMD DSH limit equal to the lesser of the amount in Column I or Column C.
Column K	**FY 2020 IMD DSH Limit in Federal Share, Col. G x J.** This column contains the FY 2020 Federal Share IMD DSH limit determined by converting the total computable FY 2020 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2020 FMAP in Column G.

ADDENDUM 7: PRELIMINARY IMD DSH LIMIT FOR FISCAL YEAR: 2020

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2020 Allotment In FS	FY 2020 FMAPs**	FY 2020 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col H	FY 2020 TC IMD Limit (Lesser Of Col I or Col C)	FY 2020 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	**$390,567,332**	78.17%	$499,638,394	$5,328,141	$4,451,770	**$3,479,949**	N/A
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	**$128,885,500**	76.22%	$169,096,694	$39,341,222	$28,474,900	**$21,703,569**	N/A
CALIFORNIA	$2,189,879,543	$1,555,919	$2,191,435,462	0.07%	**$1,440,914,138**	56.20%	$2,563,904,160	$1,820,372	$1,555,919	**$874,426**	N/A
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	**$121,582,264**	56.20%	$216,338,548	$737,401	$594,776	**$334,264**	N/A
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	**$262,880,574**	56.20%	$467,759,028	$120,760,768	$105,573,725	**$59,332,433**	N/A
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	**$77,969,583**	76.20%	$102,322,287	$14,534,538	$6,545,136	**$4,987,394**	N/A
FLORIDA	$184,468,014	$149,714,986	$334,183,000	33.00%	**$257,469,118**	67.67%	$380,477,491	$125,557,572	$125,557,572	**$84,964,809**	N/A
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	**$343,228,177**	73.50%	$466,977,111	$0	$0	**$0**	N/A
ILLINOIS	$315,868,508	$89,408,276	$405,276,784	22.06%	**$282,509,567**	56.34%	$501,436,931	$110,622,205	$89,408,276	**$50,372,623**	N/A
INDIANA	$79,960,783	$153,566,302	$233,527,085	33.00%	**$273,496,765**	72.04%	$379,645,703	$125,283,082	$125,283,082	**$90,253,932**	N/A
KANSAS	$11,587,208	$76,663,508	$88,250,716	33.00%	**$53,292,981**	65.36%	$81,537,608	$26,907,411	$26,907,411	**$17,586,684**	N/A
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	19.08%	**$184,200,471**	78.02%	$236,093,913	$45,045,465	$37,443,073	**$29,213,086**	N/A
LOUISIANA	$1,078,512,169	$132,917,149	$1,211,429,318	10.97%	**$876,165,874**	73.06%	$1,199,241,547	$131,579,916	$131,579,916	**$96,132,286**	N/A
MAINE	$99,957,958	$60,958,342	$160,916,300	33.00%	**$134,718,997**	70.00%	$192,455,710	$63,510,384	$60,958,342	**$42,670,839**	N/A
MARYLAND	$22,226,467	$120,873,531	$143,099,998	33.00%	**$100,223,220**	56.20%	$178,333,132	$58,849,934	$58,849,934	**$33,073,663**	N/A
MASSACHUSETTS	$469,653,946	$105,635,054	$575,289,000	18.36%	**$400,892,873**	56.20%	$713,332,514	$130,982,721	$105,635,054	**$59,366,900**	N/A
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	33.00%	**$339,882,865**	70.26%	$483,750,164	$159,637,554	$159,637,554	**$112,161,346**	N/A
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	**$192,696,149**	83.18%	$231,661,637	$0	$0	**$0**	N/A
MISSOURI	$521,946,524	$207,234,618	$729,181,142	28.42%	**$606,322,172**	71.85%	$843,872,195	$239,830,026	$207,234,618	**$148,898,073**	N/A
NEVADA	$73,560,000	$0	$73,560,000	0.00%	**$59,329,823**	70.13%	$84,599,776	$0	$0	**$0**	N/A
NEW HAMPSHIRE	$92,675,916	$94,753,948	$187,429,864	33.00%	**$210,433,956**	56.20%	$374,437,644	$123,564,423	$94,753,948	**$53,251,719**	N/A
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	**$846,146,844**	56.20%	$1,505,599,366	$491,774,378	$357,370,461	**$200,842,199**	N/A
NEW YORK	$2,418,869,368	$605,000,000	$3,023,869,368	20.01%	**$2,111,259,599**	56.20%	$3,756,689,678	$751,618,863	$605,000,000	**$340,010,000**	N/A
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	33.00%	**$376,880,802**	73.23%	$514,653,560	$169,835,675	$169,835,675	**$124,370,665**	N/A
OHIO	$535,731,956	$93,432,758	$629,164,714	14.85%	**$521,805,626**	69.22%	$753,836,501	$111,946,875	$93,432,758	**$64,674,155**	N/A
PENNSYLVANIA	$388,207,319	$579,199,682	$967,407,001	33.00%	**$734,204,023**	58.45%	$1,256,123,221	$414,520,663	$414,520,663	**$242,287,327**	N/A
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	**$84,911,073**	59.15%	$143,552,110	$3,103,795	$2,397,833	**$1,418,318**	N/A
SOUTH CAROLINA	$366,681,364	$72,076,341	$438,757,705	16.43%	**$416,562,734**	76.90%	$541,694,062	$88,986,075	$72,076,341	**$55,426,706**	N/A
TENNESSEE*	$0	$0	$0	0.00%	**$58,148,612**	71.41%	$81,429,229	$0	$0	**$0**	N/A
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	**$1,232,098,565**	67.09%	$1,836,486,160	$355,047,501	$292,513,592	**$196,247,369**	N/A
VERMONT	$19,979,252	$9,071,297	$29,050,549	31.23%	**$29,340,243**	60.06%	$48,851,554	$15,254,340	$9,071,297	**$5,448,221**	N/A
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.67%	**$115,151,645**	56.20%	$204,896,166	$11,614,055	$7,770,268	**$4,366,891**	N/A

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2020 Allotment In FS	FY 2020 FMAPs**	FY 2020 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2020 Allotments in TC Col E x Col H	FY 2020 TC IMD Limit (Lesser Of Col I or Col C)	FY 2020 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
WASHINGTON	$171,725,815	$163,836,435	$335,562,250	33.00%	**$243,164,530**	56.20%	$432,677,100	$142,783,443	$142,783,443	**$80,244,295**	N/A
WEST VIRGINIA	$66,962,606	$18,887,045	$85,849,651	22.00%	**$85,464,798**	81.14%	$105,330,044	$23,172,759	$18,887,045	**$15,324,948**	N/A
TOTAL	**$13,402,460,846**	**$4,118,758,904**	**$17,521,219,750**		**$13,592,801,492**		**$21,548,730,937**	**$4,103,551,554**	**$3,556,104,381**	**$2,239,319,089**	
LOW DSH STATES											
ALASKA	$2,506,827	$17,611,765	$20,118,592	33.00%	**$26,773,982**	56.20%	$47,640,538	$15,721,378	$15,721,378	**$8,835,414**	LOW DSH
ARKANSAS	$2,422,649	$819,351	$3,242,000	25.27%	**$54,824,390**	77.62%	$70,631,782	$17,850,778	$819,351	**$635,980**	LOW DSH
DELAWARE	$0	$7,069,000	$7,069,000	33.00%	**$11,721,214**	64.06%	$18,297,243	$6,038,090	$6,038,090	**$3,868,001**	LOW DSH
HAWAII	$0	$0	$0	0.00%	**$12,718,187**	59.67%	$21,314,206	$0	$0	**$0**	LOW DSH
IDAHO	$2,081,429	$0	$2,081,429	0.00%	**$20,916,263**	76.54%	$27,327,232	$0	$0	**$0**	LOW DSH
IOWA	$12,011,250	$0	$12,011,250	0.00%	**$50,717,628**	67.40%	$75,248,706	$0	$0	**$0**	LOW DSH
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	**$98,171,272**	56.20%	$174,681,978	$31,133,128	$5,257,214	**$2,954,554**	LOW DSH
MONTANA	$237,048	$0	$237,048	0.00%	**$14,543,963**	70.98%	$20,490,227	$0	$0	**$0**	LOW DSH
NEBRASKA	$6,449,102	$1,811,337	$8,260,439	21.93%	**$36,841,315**	60.92%	$60,474,910	$13,260,850	$1,811,337	**$1,103,467**	LOW DSH
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	**$25,851,429**	78.91%	$32,760,651	$1,237,539	$254,786	**$201,052**	LOW DSH
NORTH DAKOTA	$214,523	$988,478	$1,203,001	33.00%	**$12,553,768**	56.25%	$22,317,810	$7,364,877	$988,478	**$556,019**	LOW DSH
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	**$46,324,002**	72.22%	$64,142,899	$9,013,595	$3,273,248	**$2,363,940**	LOW DSH
OREGON	$11,437,908	$19,975,092	$31,413,000	33.00%	**$58,293,894**	67.43%	$86,450,977	$28,528,822	$19,975,092	**$13,469,205**	LOW DSH
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	33.00%	**$14,305,319**	63.82%	$22,415,104	$7,396,984	$751,299	**$479,479**	LOW DSH
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	**$25,027,095**	74.39%	$33,643,090	$6,901,760	$934,586	**$695,239**	LOW DSH
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	33.00%	**$122,092,745**	65.56%	$186,230,544	$61,456,080	$4,492,011	**$2,944,962**	LOW DSH
WYOMING	$0	$0	$0	0.00%	**$297,489**	56.20%	$529,340	$0	$0	**$0**	LOW DSH
TOTAL LOW DSH STATES	**$98,662,480**	**$63,238,167**	**$161,900,647**		**$631,973,955**		**$964,597,238**	**$205,903,881**	**$60,316,870**	**$38,107,312**	
TOTAL	**$13,501,123,326**	**$4,181,997,071**	**$17,683,120,397**		**$14,224,775,447**		**$22,513,328,175**	**$4,309,455,435**	**$3,616,421,251**	**$2,277,426,401**	

FOOTNOTES:

*** Tennessee's DSH allotment for FY 2020 determined under section 1923(f)(6)(A) of the Act, is $53,100,000.**

**** Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.**

Key to ADDENDUM 8: Preliminary IMD DSH Limits for FY 2021

The preliminary FY 2021 IMD DSH Limits for the Non-Low DSH States are presented in the top section of this addendum and the preliminary FY 2021 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the addendum.	
Column	**Description**
Column A	**State.**
Column B	**Inpatient Hospital Services FY 95 DSH Total Computable.** This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column C	**IMD and Mental Health Services FY 95 DSH Total Computable** This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS-64 as of January 1, 1997.
Column D	**Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C** This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS-64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	**Applicable Percentage, Col. C/D.** This column contains the "applicable percentage" representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) of the Act, for FYs after FY 2002, the applicable percentage can be no greater than 33 percent.
Column F	**FY 2021 Federal Share DSH Allotment.** This column contains the States' preliminary FY 2021 DSH allotments from Addendum 4, Column J.
Column G	**FY 2021 FMAP.** This column contains the full FFCRA FMAP rate from Addendum 4, Column B2.
Column H	**FY 2021 DSH Allotments in Total Computable, Col. F/G.** This column contains States' FY 2021 total computable DSH allotment (determined as Column F/Column G).
Column I	**Applicable Percentage Applied to FY 2021 Allotments in TC, Col E x Col H.** This column contains the applicable percentage of FY 2021 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H).
Column J	**FY 2021 TC IMD DSH Limit. Lesser of Col. I or C.** This column contains the total computable FY 2021 TC IMD DSH limit equal to the lesser of the amount in Column I or Column C.
Column K	**FY 2021 IMD DSH Limit in Federal Share, Col. G x J.** This column contains the FY 2021 Federal Share IMD DSH limit determined by converting the total computable FY 2021 IMD DSH limit from Column J into a Federal share amount by multiplying it by the FY 2021 FMAP in Column G.

ADDENDUM 8: PRELIMINARY IMD DSH LIMIT FOR FISCAL YEAR: 2021

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2021 Allotment In FS	FY 2021 FMAPs**	FY 2021 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2021 Allotments in TC Col E x Col H	FY 2021 TC IMD Limit (Lesser Of Col I or Col C)	FY 2021 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	**$396,161,585**	78.78%	$502,870,761	$5,362,611	$4,451,770	**$3,507,104**	N/A
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	**$130,820,303**	76.21%	$171,657,660	$39,937,044	$28,474,900	**$21,700,721**	N/A
CALIFORNIA	$2,189,879,543	$1,555,919	$2,191,435,462	0.07%	**$1,462,527,850**	56.20%	$2,602,362,722	$1,847,677	$1,555,919	**$874,426**	N/A
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	**$123,405,998**	56.20%	$219,583,626	$748,462	$594,776	**$334,264**	N/A
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	**$266,823,783**	56.20%	$474,775,414	$122,572,179	$105,573,725	**$59,332,433**	N/A
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	**$79,139,127**	76.20%	$103,857,121	$14,752,556	$6,545,136	**$4,987,394**	N/A
FLORIDA	$184,468,014	$149,714,986	$334,183,000	33.00%	**$261,141,803**	68.16%	$383,130,579	$126,433,091	$126,433,091	**$86,176,795**	N/A
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	**$348,494,971**	73.23%	$475,890,989	$0	$0	**$0**	N/A
ILLINOIS	$315,868,508	$89,408,276	$405,276,784	22.06%	**$286,239,450**	57.16%	$500,768,807	$110,474,810	$89,408,276	**$51,105,771**	N/A
INDIANA	$79,960,783	$153,566,302	$233,527,085	33.00%	**$277,602,845**	72.03%	$385,398,925	$127,181,645	$127,181,645	**$91,608,939**	N/A
KANSAS	$11,587,208	$76,663,508	$88,250,716	33.00%	**$54,047,667**	65.88%	$82,039,568	$27,073,057	$27,073,057	**$17,835,730**	N/A
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	19.08%	**$186,916,050**	78.25%	$238,870,351	$45,575,195	$37,443,073	**$29,299,205**	N/A
LOUISIANA	$1,078,512,169	$132,917,149	$1,211,429,318	10.97%	**$888,681,511**	73.62%	$1,207,119,684	$132,444,299	$132,444,299	**$97,505,493**	N/A
MAINE	$99,957,958	$60,958,342	$160,916,300	33.00%	**$136,760,699**	69.85%	$195,679,925	$64,574,375	$60,958,342	**$42,603,785**	N/A
MARYLAND	$22,226,467	$120,873,531	$143,099,998	33.00%	**$101,726,568**	56.20%	$181,008,128	$59,732,682	$59,732,682	**$33,569,767**	N/A
MASSACHUSETTS	$469,653,946	$105,635,054	$575,289,000	18.36%	**$406,906,266**	56.20%	$724,032,502	$132,947,462	$105,635,054	**$59,366,900**	N/A
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	33.00%	**$344,971,606**	70.28%	$490,853,168	$161,981,545	$161,981,545	**$113,840,630**	N/A
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	**$195,440,357**	83.96%	$232,777,939	$0	$0	**$0**	N/A
MISSOURI	$521,946,524	$207,234,618	$729,181,142	28.42%	**$615,981,080**	71.16%	$865,628,274	$246,013,143	$207,234,618	**$147,468,154**	N/A
NEVADA	$73,560,000	$0	$73,560,000	0.00%	**$60,272,757**	69.50%	$86,723,392	$0	$0	**$0**	N/A
NEW HAMPSHIRE	$92,675,916	$94,753,948	$187,429,864	33.00%	**$213,590,465**	56.20%	$380,054,208	$125,417,889	$94,753,948	**$53,251,719**	N/A
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	**$858,839,046**	56.20%	$1,528,183,356	$499,150,993	$357,370,461	**$200,842,199**	N/A
NEW YORK	$2,418,869,368	$605,000,000	$3,023,869,368	20.01%	**$2,142,928,493**	56.20%	$3,813,040,024	$762,893,146	$605,000,000	**$340,010,000**	N/A
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	33.00%	**$382,356,221**	73.60%	$519,505,734	$171,436,892	$171,436,892	**$126,177,553**	N/A
OHIO	$535,731,956	$93,432,758	$629,164,714	14.85%	**$529,177,928**	69.83%	$757,808,862	$112,536,782	$93,432,758	**$65,244,095**	N/A
PENNSYLVANIA	$388,207,319	$579,199,682	$967,407,001	33.00%	**$745,292,800**	58.40%	$1,276,186,301	$421,141,479	$421,141,479	**$245,946,624**	N/A
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	**$85,994,344**	60.29%	$142,634,507	$3,083,955	$2,397,833	**$1,445,654**	N/A
SOUTH CAROLINA	$366,681,364	$72,076,341	$438,757,705	16.43%	**$422,844,960**	76.83%	$550,364,389	$90,410,381	$72,076,341	**$55,376,253**	N/A
TENNESSEE*	$0	$0	$0	0.00%	**$58,080,635**	72.30%	$80,332,829	$0	$0	**$0**	N/A
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	**$1,248,859,861**	68.01%	$1,836,288,576	$355,009,302	$292,513,592	**$198,938,494**	N/A
VERMONT	$19,979,252	$9,071,297	$29,050,549	31.23%	**$29,740,349**	60.77%	$48,939,196	$15,281,707	$9,071,297	**$5,512,627**	N/A
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.67%	**$116,878,920**	56.20%	$207,969,608	$11,788,265	$7,770,268	**$4,366,891**	N/A

A	B	C	D	E	F	G	H	I	J	K	L
STATE	Inpatient Hospital Services FY 95 DSH Total Computable	IMD And Mental Health Services FY 95 DSH Total Computable	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable Col B + C	Applicable Percent Col C/D	FY 2021 Allotment In FS	FY 2021 FMAPs**	FY 2021 Allotments in TC Col F/G	Applicable Percentage Applied to FY 2021 Allotments in TC Col E x Col H	FY 2021 TC IMD Limit (Lesser Of Col I or Col C)	FY 2021 IMD Limit In FS Col G x J	MMA LOW DSH STATUS
WASHINGTON	$171,725,815	$163,836,435	$335,562,250	33.00%	**$246,811,998**	56.20%	$439,167,256	$144,925,194	$144,925,194	**$81,447,959**	N/A
WEST VIRGINIA	$66,962,606	$18,887,045	$85,849,651	22.00%	**$86,742,350**	81.19%	$106,838,712	$23,504,668	$18,887,045	**$15,334,392**	N/A
TOTAL	**$13,402,460,846**	**$4,118,758,904**	**$17,521,219,750**		**$13,792,200,648**		**$21,812,343,093**	**$4,156,232,490**	**$3,573,499,018**	**$2,255,011,971**	
LOW DSH STATES											
ALASKA	$2,506,827	$17,611,765	$20,118,592	33.00%	**$27,175,592**	56.20%	$48,355,146	$15,957,198	$15,957,198	**$8,967,945**	LOW DSH
ARKANSAS	$2,422,649	$819,351	$3,242,000	25.27%	**$55,658,611**	77.43%	$71,882,489	$18,166,869	$819,351	**$634,423**	LOW DSH
DELAWARE	$0	$7,069,000	$7,069,000	33.00%	**$11,899,426**	63.94%	$18,610,300	$6,141,399	$6,141,399	**$3,926,810**	LOW DSH
HAWAII	$0	$0	$0	0.00%	**$12,920,344**	59.22%	$21,817,535	$0	$0	**$0**	LOW DSH
IDAHO	$2,081,429	$0	$2,081,429	0.00%	**$21,228,298**	76.61%	$27,709,565	$0	$0	**$0**	LOW DSH
IOWA	$12,011,250	$0	$12,011,250	0.00%	**$51,436,214**	67.95%	$75,697,151	$0	$0	**$0**	LOW DSH
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	**$99,643,841**	56.20%	$177,302,208	$31,600,125	$5,257,214	**$2,954,554**	LOW DSH
MONTANA	$237,048	$0	$237,048	0.00%	**$14,746,005**	71.80%	$20,537,611	$0	$0	**$0**	LOW DSH
NEBRASKA	$6,449,102	$1,811,337	$8,260,439	21.93%	**$37,275,997**	62.67%	$59,479,811	$13,042,646	$1,811,337	**$1,135,165**	LOW DSH
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	**$26,218,152**	79.66%	$32,912,569	$1,243,278	$254,786	**$202,963**	LOW DSH
NORTH DAKOTA	$214,523	$988,478	$1,203,001	33.00%	**$12,679,089**	58.60%	$21,636,670	$7,140,101	$988,478	**$579,248**	LOW DSH
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	**$46,901,904**	74.19%	$63,218,634	$8,883,713	$3,273,248	**$2,428,423**	LOW DSH
OREGON	$11,437,908	$19,975,092	$31,413,000	33.00%	**$59,203,176**	67.04%	$88,310,227	$29,142,375	$19,975,092	**$13,391,302**	LOW DSH
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	33.00%	**$14,503,925**	64.48%	$22,493,681	$7,422,915	$751,299	**$484,438**	LOW DSH
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	**$25,423,509**	73.72%	$34,486,583	$7,074,799	$934,586	**$688,977**	LOW DSH
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	33.00%	**$123,922,162**	65.57%	$188,992,164	$62,367,414	$4,492,011	**$2,945,412**	LOW DSH
WYOMING	$0	$0	$0	0.00%	**$301,951**	56.20%	$537,280	$0	$0	**$0**	LOW DSH
TOTAL LOW DSH STATES	**$98,662,480**	**$63,238,167**	**$161,900,647**		**$641,138,198**		**$973,979,623**	**$208,182,833**	**$60,655,999**	**$38,339,660**	
TOTAL	**$13,501,123,326**	**$4,181,997,071**	**$17,683,120,397**		**$14,433,338,845**		**$22,786,322,716**	**$4,364,415,323**	**$3,634,155,018**	**$2,293,351,631**	

FOOTNOTES:

*** Tennessee's DSH allotment for FY 2021 determined under section 1923(f)(6)(A) of the Act, is $53,100,000.**

**** Section 6008 of the Families First Coronavirus Response Act (FFCRA) provides a temporary 6.2 percentage point increase to each qualifying State and territory's State-specific FMAP as defined in section 1905(b) of the Act.**

[FR Doc. 2022–05459 Filed 3–14–22; 4:15 pm]
BILLING CODE 4120–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–0284]

Over-the-Counter Monograph Drug User Fee Rates for Fiscal Year 2022

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the fee rates under the over-the-counter (OTC) monograph drug user fee program (OMUFA) for fiscal year (FY) 2022. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to assess and collect user fees from qualifying manufacturers of OTC monograph drugs and submitters of OTC monograph order requests. This notice publishes the OMUFA fee rates for FY 2022.

FOR FURTHER INFORMATION CONTACT: David Haas, Office of Financial Management, Food and Drug Administration, 4041 Powder Mill Rd., Rm. 61075, Beltsville, MD 20705–4304, 240–402–9845.

SUPPLEMENTARY INFORMATION:

I. Background

Section 744M of the FD&C Act (21 U.S.C. 379j–72), as added by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), authorizes FDA to assess and collect: (1) Facility fees from qualifying owners of OTC monograph drug facilities and (2) fees from submitters of qualifying OTC monograph order requests. These fees are to support FDA's OTC monograph drug activities, which are detailed in section 744L(6) of the FD&C Act (21 U.S.C. 379j–71(6)) and include various FDA activities associated with OTC monograph drugs and inspection of facilities associated with such products.

For OMUFA purposes:

- An OTC monograph drug is a nonprescription drug without an approved new drug application that is governed by the provisions of section 505G of the FD&C Act (21 U.S.C. 355h) (see section 744L(5) of the FD&C Act);
- An OTC monograph drug facility (MDF) is a foreign or domestic business or other entity that, in addition to meeting other criteria, is engaged in manufacturing or processing the finished dosage form of an OTC monograph drug (see section 744L(10) of the FD&C Act);
- A contract manufacturing organization (CMO) facility is an OTC monograph drug facility where neither the owner nor any affiliate of the owner or facility sells the OTC monograph drug produced at such facility directly to wholesalers, retailers, or consumers in the United States (see section 744L(2) of the FD&C Act); and
- An OTC monograph order request (OMOR) is a request for an administrative order, with respect to an OTC monograph drug, which is submitted under section 505G(b)(5) of the FD&C Act (see section 744L(7) of the FD&C Act).

Under section 744M(a)(1)(A) of the FD&C Act, a facility fee for FY 2022 shall be assessed with respect to each facility that is identified as an OTC monograph drug facility during the fee-liable period from January 1, 2021, through December 31, 2021.[1] Consistent with the statute, FDA will assess and collect facility fees with respect to the two types of OTC monograph drug facilities—MDF and CMO facilities. A full facility fee will be assessed to each qualifying person that owns a facility identified as an MDF (see section 744M(a)(1)(A) of the FD&C Act), and a reduced facility fee of two-thirds will be assessed to each qualifying person that owns a facility identified as a CMO facility (see section 744M(a)(1)(B)(ii) of the FD&C Act). The facility fees for FY 2022 are due on June 1, 2022 (see section 744M(a)(1)(D)(ii) of the FD&C Act).[2]

As discussed in greater detail below:

- OTC monograph drug facilities are exempt from FY 2022 facility fees if they had ceased OTC monograph drug activities, and updated their registration with FDA to that effect, prior to December 31, 2020 (see section 744M(a)(1)(B)(i) of the FD&C Act).
- Entities that registered with FDA during the Coronavirus Disease 2019 (COVID–19) pandemic whose sole activity with respect to OTC monograph drugs during the pandemic consists (or had consisted) of manufacturing OTC hand sanitizer products[3] are not identified as OTC monograph drug facilities subject to OMUFA facility fees.[4]

In addition to facility fees, the Agency is authorized to assess and collect fees from submitters of OMORs, except for OMORs that request certain safety-related changes (as discussed below). There are two levels of OMOR fees, based on whether the OMOR at issue is a Tier 1 or Tier 2 OMOR.[5]

For FY 2022, the OMUFA fee rates are: Tier 1 OMOR fees ($507,021), Tier 2 OMOR fees ($101,404), MDF facility fees ($24,178), and CMO facility fees ($16,119). These fees are effective for the period from October 1, 2021, through September 30, 2022.[6] This document is issued pursuant to sections 744M(a)(4) and 744M(c)(4)(B) of the FD&C Act and describes the calculations used to set the OMUFA facility fees and OMOR fees for FY 2022 in accordance with the directives in the statute.

II. Facility Fee Revenue Amount for FY 2022

A. Base Fee Revenue Amount

Under OMUFA, FDA sets annual facility fees to generate the total facility fee revenues for each fiscal year established by section 744M(b) of the FD&C Act. The yearly base revenue amount is the starting point for setting annual facility fee rates. The base revenue for FY 2022 is the dollar amount of the total revenue amount for the previous fiscal year, without certain adjustments made for that previous year, and is $8,000,000 (see section 744M(b)(3)(B) of the FD&C Act).

B. Fee Revenue Adjustment for Inflation

Under OMUFA, the annual base revenue amount for facility fees is

[1] Under section 744M(a)(1) of the FD&C Act, ''Each person that owns a facility identified as an OTC monograph drug facility on December 31 of the fiscal year or at any time during the preceding 12-month period shall be assessed an annual fee for each such facility''. For purposes of FY 2022 facility fees, that time period is January 1, 2021, through December 31, 2021.

[2] Assuming that, as we anticipate, the FY 2022 fee appropriation will occur prior to June 1, 2022. Under section 744M(a)(1)(D)(ii), the FY 2022 facility fees are due on the later of (1) the first business day of June 2022 (*i.e.,* June 1, 2022) or (2) the first business day after the enactment of an appropriations Act providing for the collection and obligation of FY 2022 OMUFA fees.

[3] The term ''hand sanitizer'' commonly refers to consumer antiseptic rubs. However, because the Health and Human Services (HHS) notice published January 12, 2021, referred to ''persons that entered the over-the-counter drug market to supply hand sanitizer products in response to the COVID–19 Public Health Emergency'' (86 FR 2420,*https://www.federalregister.gov/documents/2021/01/12/2021–00237/notice-that-persons-that-entered-the-over-the-counter-drug-market-to-supply-hand-sanitizer-during*), we are using the same terminology—''hand sanitizer products''—to refer to OTC monograph drug products intended for use (without water) as antiseptic hand rubs or antiseptic hand wipes by consumers or healthcare personnel.

[4] See HHS **Federal Register** notice of January 12, 2021, 86 FR 2420, *https://www.federalregister.gov/documents/2021/01/12/2021-00237/notice-that-persons-that-entered-the-over-the-counter-drug-market-to-supply-hand-sanitizer-during.*

[5] Under OMUFA, a Tier 1 OMOR is defined as any OMOR that is not a Tier 2 OMOR (see section 744L(8) of the FD&C Act). Tier 2 OMORs are detailed in section 744L(9) of the FD&C Act.

[6] These OMUFA fees are for FY 2022, per section 744M(a) of the FD&C Act.

adjusted for inflation for FY 2022 and each subsequent fiscal year (see section 744M(c)(1) of the FD&C Act). That provision states that the dollar amount of the inflation adjustment is equal to the product of the annual base revenue for the fiscal year and the inflation adjustment percentage. For each of FYs 2022 and 2023, the inflation adjustment percentage is equal to the average annual percent change that occurred in the Consumer Price Index (CPI) for urban consumers (Washington-Baltimore, DC-MD-VA-WV; Not Seasonally Adjusted; All items; Annual Index) for the first 3 years of the preceding 4 years of available data (section 744M(c)(1)(C) of the FD&C Act). As a result of a geographical revision made by the Bureau of Labor and Statistics in January 2018, the ''Washington, DC-Baltimore'' index was discontinued and replaced with two separate indices (*i.e.,* the ''Washington-Arlington-Alexandria'' and ''Baltimore-Columbia-Towson'' indices). To continue applying a CPI that best reflects the geographic region in which FDA is located and that provides the most current data available, the ''Washington-Arlington-Alexandria'' index is used in calculating the inflation adjustment percentage. Table 1 provides the summary data for the percent changes in the specified CPI for the Washington-Arlington-Alexandria area. The data are published by the Bureau of Labor Statistics and can be found on its website at: *https://data.bls.gov/pdq/SurveyOutputServlet?data_tool=dropmap&series_id=CUURS35ASA0,CUUSS35ASA0.*

TABLE 1—ANNUAL AND 3-YEAR AVERAGE PERCENT CHANGE IN CPI FOR WASHINGTON-ARLINGTON-ALEXANDRIA AREA

Year	2018	2019	2020	3-year average
Annual CPI	261.445	264.777	267.157	.....
Annual Percent Change	2.0389%	1.2745%	0.8989%	1.4041%

Pursuant to the statute, the FY 2022 base revenue of $8,000,000 is increased by 1.4041 percent, yielding an inflation adjusted base revenue amount of $8,112,328 for FY 2022 (see section 744M(c)(1)(A)).

C. Additional Dollar Amounts

The inflation adjusted revenue amount of $8,112,328 is increased by an additional dollar amount of $7,000,000 as specified in the statute (see section 744M(b)(2)(E) of the FD&C Act). This yields an adjusted fee revenue subtotal of $15,112,328.

D. Fee Revenue Adjustment for Additional Direct Cost

Fee revenue is further adjusted for additional direct costs as specified in the statute. In FY 2022, $7,000,000 is added to the facility fee revenues to account for additional direct costs (see section 744M(c)(3)(B) of the FD&C Act). Adding the additional direct costs amount of $7,000,000 to $15,112,328 yields an additional direct cost adjusted fee revenue of $22,112,328.

E. Fee Revenue Adjustment for Operating Reserve

Under OMUFA, FDA may further increase the FY 2022 facility fee revenue and fees if such an adjustment is necessary to provide up to 7 weeks of operating reserves of carryover user fees for OTC monograph drug activities (see section 744M(c)(2)(B) of the FD&C Act). Accordingly, in setting fees for FY 2022, the Agency must estimate its carryover for FY 2022, to ensure the Agency has sufficient carryover to continue its OTC monograph drug activities, as required under the statute, including an operating reserve to mitigate certain financial risks, such as under collections, unanticipated surges in program costs, or a lapse in appropriations. Under the statute, if FDA has carryover for OTC monograph drug activities that would exceed 10 weeks of such operating reserves, FDA is required to decrease FY 2022 fee revenues and fees to provide for not more than 10 weeks of operating reserves of carryover user fees (see section 744M(c)(2)(C) of the FD&C Act). As described below, a fee revenue adjustment for the FY 2022 operating reserve is necessary to ensure that FDA has sufficient resources to maintain its authorized OTC monograph drug activities.

Per the statute, OMUFA facility fees are not due until the third quarter of each fiscal year (*i.e.,* June 1). To address this timing of facility fee collections for late in the fiscal year, the Agency must set aside additional carryover, beyond that for an operating reserve, to sustain the Agency's OTC monograph drug activities until the facility fees for the subsequent fiscal year are due and payable on June 1, 2023. Thus, the Agency will require FY 2022 carryover sufficient to cover payroll and operating expenses for the first 8 months (*i.e.,* 35 weeks rounded) of the following fiscal year (*i.e.,* October 1, 2022, to May 31, 2023). To determine the carryover needed, the Agency starts with the additional direct cost adjusted fee revenue of $22,112,328 (calculated in section D), divides it by 52 to yield a weekly operating amount of $425,237, and then multiplies the weekly operating amount by 35. Based on this calculation, FDA requires $14,883,298 to support the program until the FY 2023 fees are due. After running analyses on the projected collections and obligations for FY 2022, FDA estimates the FY 2022 carryover to be $13,107,260 which is $1,776,038 lower than the total required to support the program through the 35-week period (*i.e.,* $14,883,298).

Therefore, FDA is applying an operating reserve adjustment for FY 2022 in the amount of $1,776,038, equating to approximately 4 weeks of program costs, to increase the FY 2022 facility fee revenue and fees to enable the Agency to sustain program operations through the 35-week period of FY 2023. As a result of the above calculations, the final FY 2022 OMUFA target facility fee revenue is $23,888,000 (rounded to the nearest thousand dollars).

III. Determination of FY 2022 OMOR Fees

Under OMUFA, the FY 2022 Tier 1 OMOR fee is $507,021 and the Tier 2 OMOR fee is $101,404 (see section 744M(a)(2)(A)(i) and (ii) of the FD&C Act, respectively) including an adjustment for inflation. OMOR fees are not included in the OMUFA target revenue calculation, which is based on the facility fees (see section 744M(b)(1) of the FD&C Act).

An OMOR fee is generally assessed to each person who submits an OMOR (see section 744M(a)(2)(A) of the FD&C Act). OMOR fees are due on the date of the submission of the OMOR (see section 744M(a)(2)(B) of the FD&C Act). The payor should submit the OMOR fee that applies to the type of OMOR they are submitting (*i.e.,* Tier 1 or Tier 2). FDA will determine whether the appropriate OMOR fee has been submitted following receipt of the OMOR and the fee.

An OMOR fee will not be assessed if the OMOR seeks to make certain safety changes with respect to an OTC monograph drug. Specifically, no fee will be assessed if FDA finds that the OMOR seeks to change the drug facts labeling of an OTC monograph drug in a way that would add to or strengthen: (1) A contraindication, warning, or precaution; (2) a statement about risk associated with misuse or abuse; or (3) an instruction about dosage and administration that is intended to increase the safe use of the OTC monograph drug (see section 744M(a)(2)(C) of the FD&C Act).

IV. Facility Fee Calculations

A. Facility Fee Revenues and Fees

For FY 2022, facility fee rates are being established to generate a total target revenue amount, as determined under the statute, equal to $23,888,000 (rounded to the nearest thousand dollars). FDA used the methodology described below to determine the appropriate number of MDF and CMO facilities to be used in setting the OMUFA facility fees for FY 2022. FDA took into consideration that the CMO facility fee is equal to two-thirds of the amount of the MDF facility fee (see section 744M(a)(1)(B)(ii) of the FD&C Act).

B. Calculating the Number of Qualifying Facilities and Setting the Facility Fees

For FY 2022, FDA utilized data consisting of the number of facilities that were registered in FDA's electronic Drug Registration and Listing System (eDRLS) to manufacture human OTC products produced under a monograph [7] during the FY 2021 fee-liable period (*i.e.,* January 1, 2020, through December 31, 2020) and the number of facilities that paid FY 2021 OMUFA fees, as the primary sources for estimating the number of each facility fee type (*i.e.,* MDF and CMO). In addition, the Agency considered data provided by firms regarding their operation as MDFs and CMOs during FY 2021—*i.e.,* October 1, 2020, through September 30, 2021—when they were submitting OTC Monograph User Fee Cover Sheets to pay the FY 2021 fee. These data helped FDA estimate the number of firms operating as MDF and CMO facilities during the FY 2022 fee-liable period (*i.e.,* January 1, 2021, through December 31, 2021) [8] and thus informed FDA's calculation of the number and ratio of MDF and CMO facilities used in determining the FY 2022 fee rates. FDA's review of data also reflected input received during the first three quarters of the FY 2022 fee-liable period from facilities whose manufacturing or processing practices meet the definition of fee-eligible OTC monograph drug facilities, to help capture those facilities that are in the market and intend to remain in the market for FY 2022.

Those facilities that only manufacture the active pharmaceutical ingredient of an OTC monograph drug do not meet the definition of an OTC monograph drug facility (see section 744L(10)(A)(i)(II)) of the FD&C Act). Likewise, a facility is not an OTC monograph drug facility if its only manufacturing or processing activities are one or more of the following: (1) Production of clinical research supplies; (2) testing; or (3) placement of outer packaging on packages containing multiple products, for such purposes as creating multipacks, when each monograph drug product contained within the overpackaging is already in a final packaged form prior to placement in the outer overpackaging (see section 744L(10)(A)(iii) of the FD&C Act).

Consistent with the January 12, 2021, HHS **Federal Register** Notice [9] and FDA's subsequent March 26, 2021, **Federal Register** Notice publishing FY 2021 OMUFA fees,[10] facilities are not identified as an ''OTC monograph drug facility'' and will not be assessed a FY 2022 OMUFA facility fee if they: (1) Were not registered with FDA as OTC drug manufacturers prior to the HHS declaration of the COVID–19 public health emergency on January 27, 2020 [11]; (2) registered with FDA on or after the declaration of the COVID–19 public health emergency; and (3) registered for the sole purpose of producing hand sanitizer products during the COVID–19 public health emergency. We note, however, that under the FD&C Act, whether an entity is subject to OMUFA fees has no bearing on whether the entity or the entity's products are subject to other requirements under the FD&C Act. FDA will continue to use its regulatory compliance and enforcement tools to protect consumers, including from potentially dangerous or subpotent hand sanitizers.

In undertaking the statutorily directed fee calculations, the Agency also made certain assumptions, including that: (1) Facilities using expired Structured Product Labeling (SPL) codes in eDRLS, that did not reregister for calendar year (CY) 2022, were no longer manufacturing and marketing OTC monograph drugs; (2) facilities that have deregistered in eDRLS have exited the market; (3) facilities that FDA believes registered incorrectly as OTC monograph drug facilities (for example, because the associated drug listings for these facilities did not include OTC monograph drugs but instead indicated such products as OTC drug products under an approved drug application or OTC animal drug products) were not engaged in manufacturing or processing the finished dosage form of an OTC monograph drug; (4) facilities that registered but did not have an active OTC monograph drug product listing associated in their registration profile were not manufacturing or processing such drug products; and (5) facilities that, at the close of FY 2021, remain on the arrears list for failure to satisfy the FY 2021 facility fee are likely to be placed on the FY 2022 arrears list as well.

Based on the above-referenced factors and assumptions, FDA estimates there will be 1,118 OMUFA fee-paying units. The Agency estimates that 65 percent ($1{,}118 \times 0.65 = 727$, rounded) will incur the MDF fee and 35 percent ($1{,}118 \times 0.35 = 391$, rounded) will incur the CMO fee.

To determine the number of full fee-paying equivalents (the denominator) to be used in setting the OMUFA fees, FDA assigns a value of 1 to each MDF (727) and a value of ⅔ to each CMO ($391 \times ⅔ = 261$) for a full facility equivalent of 988 (rounded). The target fee revenue of $23,888,000 is then divided by 988 for an MDF fee of $24,178 and a CMO fee of $16,119.

V. Fee Schedule for FY 2022

The fee rates for FY 2022 are displayed in table 1.

[7] OTC monograph drug facilities had selected in the eDRLS the business operation qualifiers of ''manufactures human over-the-counter drug products produced under a monograph'' or ''contract manufacturing for human over-the-counter drug products produced under a monograph'' and indicated at least one of the following business operations: finished dosage form manufacture, label, manufacture, pack, relabel, or repack.

[8] Under section 744M(a)(1) of the FD&C Act, ''Each person that owns a facility identified as an OTC monograph drug facility on December 31 of the fiscal year *or at any time during the preceding 12-month period* shall be assessed an annual fee for each such facility'' (emphasis added).

[9] See 86 FR 2420, *https://www.federalregister.gov/documents/2021/01/12/2021-00237/notice-that-persons-that-entered-the-over-the-counter-drug-market-to-supply-hand-sanitizer-during.*

[10] See 86 FR 16223, *https://www.federalregister.gov/documents/2021/03/26/2021-06361/fee-rates-under-the-over-the-counter-monograph-drug-user-fee-program-for-fiscal-year-2021.*

[11] See *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.*

TABLE 1—FEE SCHEDULE FOR FY 2022

Fee category	FY 2022 fee rates
OMOR:	
Tier 1	$507,021
Tier 2	101,404
Facility Fees:	
MDF	24,178
CMO	16,119

VI. Fee Payment Options and Procedures

The new fee rates are for the period from October 1, 2021, through September 30, 2022. To pay the OMOR, MDF, and CMO fees, complete an OTC Monograph User Fee Cover Sheet, available at: *https://userfees.fda.gov/OA_HTML/omufaCAcdLogin.jsp.* A user fee identification (ID) number will be generated. Payment must be made in U.S. currency by electronic check or wire transfer, payable to the order of the Food and Drug Administration. The preferred payment method is online using electronic check (Automated Clearing House (ACH) also known as eCheck) or credit card for payments under $25,000 (Discover, VISA, MasterCard, American Express).

FDA has partnered with the U.S. Department of the Treasury to use *Pay.gov,* a web-based payment application, for online electronic payment. The *Pay.gov* feature is available on the FDA website after completing the OTC Monograph User Fee Cover Sheet and generating the user fee ID number. Secure electronic payments can be submitted using the User Fees Payment Portal at *https://userfees.fda.gov/pay* (*Note:* Only full payments are accepted. No partial payments can be made online). Once an invoice is located, ''Pay Now'' should be selected to be redirected to *Pay.gov.* Electronic payment options are based on the balance due. Payment by credit card is available for balances that are less than $25,000. If the balance exceeds this amount, only the ACH option is available. Payments must be made using U.S. bank accounts as well as U.S. credit cards.

For payments made by wire transfer, include the unique user fee ID number to ensure that the payment is applied to the correct fee(s). Without the unique user fee ID number, the payment may not be applied, which could result in FDA not filing an OMOR request, for example, and other penalties. The originating financial institution may charge a wire transfer fee. Applicable wire transfer fees must be included with payment to ensure fees are fully paid. Questions about wire transfer fees should be addressed to the financial institution. The account information for wire transfers is as follows: U.S. Department of the Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, Acct. No.: 75060099, Routing No.: 021030004, SWIFT: FRNYUS33. If needed, FDA's tax identification number is 53–0196965.

If you are assessed an FY 2022 OMUFA facility fee and believe your facility is not an OTC monograph drug facility as described in this notice, please contact *CDERCollections@fda.hhs.gov.*

Dated: March 9, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05542 Filed 3–14–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–1593]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Accessories

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on medical device accessory requests.

DATES: Submit either electronic or written comments on the collection of information by May 16, 2022.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before May 16, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 16, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–N–1593 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Accessories.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential

information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Device Accessories

OMB Control Number 0910–0823—Extension

FDA's guidance document entitled ''Medical Device Accessories—Describing Accessories and Classification Pathways'' (the Accessories guidance) [1] is intended to provide guidance to industry and FDA staff about the regulation of accessories to medical devices, to describe FDA's policy concerning the classification of accessories, and to discuss the application of this policy to devices that are commonly used as accessories to other medical devices. In addition, the guidance explains what devices FDA generally considers an ''accessory'' and describes the processes under section 513(f)(6) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(f)(6)) to allow requests for risk- and regulatory control-based classification of accessories.

The FDA Reauthorization Act of 2017 (FDARA) changed how FDA regulates medical device accessories. Specifically, section 707 of FDARA added section 513(f)(6) to the statute and requires that FDA, upon request, classify existing and new accessories notwithstanding the classification of any other device with which such accessory is intended to be used. This means that the classification of an accessory may not be the same as its parent device, depending on the risks of the accessory when used as intended and the level of regulatory controls necessary for reasonable assurance of safety and effectiveness of the accessory. Until an accessory is distinctly classified, its existing classification will continue to apply. This provision does not preclude a manufacturer from submitting a De Novo request for an accessory.

Depending on an accessory's regulatory history, there are different submission types, tracking mechanisms, and deadlines:

(1) Existing accessory types are those that have been identified in a classification regulation or granted marketing authorization as part of a 510(k), pre-market application (PMA), or De Novo request (approved under OMB control numbers 0910–0120, 0910–0231, and 0910–0844, respectively). Manufacturers with marketing authorization for an existing accessory may request appropriate classification through a new stand-alone premarket submission (Existing Accessory Request). Upon request, FDA is required to meet with a manufacturer or importer to discuss the appropriate classification of an existing accessory prior to submitting a written request. Existing Accessory Requests will be initially tracked as ''Q-submissions'' (approved under OMB control number 0910–0756). FDA has a statutory deadline of 85 calendar days to respond to an Existing Accessory Request.

(2) New accessory types are those that have not been granted marketing authorization as part of a 510(k), PMA, or De Novo request. Manufacturers may include new accessories into a 510(k) or PMA with the parent device (New Accessory Request). New Accessory Requests will have the same deadline as the 510(k) or PMA. Therefore, new accessory types should follow the applicable Medical Device User Fee Amendments of 2017 deadline for the parent submission. The decision for New Accessory Requests will be separate from the decision for the marketing application.

For both Existing and New Accessory Requests, manufacturers must request proper classification of their accessory in the submission and include draft special controls, if requesting classification into class II. The processes that we use to classify an accessory will be like those used for De Novo requests. If FDA grants the Accessory Request, FDA must issue an order establishing a new classification regulation for the accessory type. If FDA denies the Accessory Request, FDA must issue a

[1] The guidance document is available on FDA's website (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/medical-device-accessories-describing-accessories-and-classification-pathways*).

letter with a detailed description and justification for our determination.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity; guidance for industry (GFI) section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Existing Accessory Request; GFI VI.A	10	1	10	40	400
New Accessory Request	5	1	5	40	200
Total					600

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on an evaluation of the information collection, we have reduced the estimated number of existing requests from 15 to 10, and we have reduced the estimated number of new requests from 10 to 5. This adjustment results in an overall reduction to the information collection by 10 responses and 400 hours annually. We believe these adjustments more accurately reflect the current number of requests associated with medical device accessory classifications.

Dated: March 2, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05517 Filed 3–15–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–D–0404]

Considerations for the Development of Chimeric Antigen Receptor T Cell Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled ''Considerations for the Development of Chimeric Antigen Receptor T Cell Products; Draft Guidance for Industry.'' The draft guidance document is intended to assist sponsors, including industry and academic sponsors, developing Chimeric Antigen Receptor (CAR) T cell products. The draft guidance includes CAR T cell-specific recommendations regarding chemistry, manufacturing, and control (CMC), pharmacology and toxicology, and clinical study design.

DATES: Submit either electronic or written comments on the draft guidance by June 14, 2022 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–D–0404 for ''Considerations for the Development of Chimeric Antigen Receptor (CAR) T Cell Products; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://*

www.regulations.gov and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Considerations for the Development of Chimeric Antigen Receptor (CAR) T Cell Products; Draft Guidance for Industry.'' The draft guidance document is intended to assist sponsors, including industry and academic sponsors, developing CAR T cell products. The guidance includes CAR T cell-specific recommendations regarding CMC, pharmacology and toxicology, and clinical study design. While the guidance specifically focuses on CAR T cell products, much of the information and recommendations provided will also be applicable to other genetically modified lymphocyte products, such as CAR Natural Killer cells or T cell receptor-modified T cells.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of another human gene therapy draft guidance document entitled ''Human Gene Therapy Products Incorporating Human Genome Editing: Draft Guidance for Industry.''

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance, when finalized, will represent the current thinking of FDA on ''Considerations for the Development of Chimeric Antigen Receptor (CAR) T Cell Products.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 50 have been approved under OMB control number 0910–0755; the collections of information in 21 CFR part 211 have been approved under OMB control number 0910–0139; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338; and the collections of information in 21 CFR part 1271 have been approved under OMB control number 0910–0543.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents/* or *https://www.regulations.gov*.

Dated: March 10, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05539 Filed 3–15–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1960]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; MedWatch: The Food and Drug Administration Safety Information and Adverse Event Reporting Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by April 15, 2022.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0291. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–45, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

MedWatch: The FDA Safety Information and Adverse Event Reporting Program

OMB Control Number 0910–0291—Revision

I. Background

MedWatch is FDA's program for reporting serious reactions, product quality problems, therapeutic inequivalence/failure, and product use errors associated with FDA-regulated

products. Examples of these products include prescription and over-the-counter medicines; biologics such as blood components, blood/plasma derivatives, and gene therapies; medical devices such as hearing aids, breast pumps, and pacemakers; combination products such as pre-filled drug syringe, metered-dose inhalers, and nasal spray; special nutritional products such as dietary supplements, medical foods, and infant formulas; cosmetics such as moisturizers, makeup, shampoos, hair dyes, and tattoos; and food, such as beverages and ingredients added to foods.

MedWatch receives reports from the public and, when appropriate, publishes safety alerts intended to protect the public health. More information regarding the MedWatch program, including user guides and consumer assistance on reporting problems to FDA, may be found on our website at *https://www.fda.gov/safety/medwatch-fda-safety-information-and-adverse-event-reporting-program.* Reports are submitted to FDA by health professionals, patients, and consumers, and FDA issues an acknowledgement upon receipt of the report. Forms may be downloaded from our website at *https://www.fda.gov/safety/medical-product-safety-information/medwatch-forms-fda-safety-reporting* and submitted by Fax or mail following the instructions; by completing and submitting forms online; or by calling FDA at 800–FDA–1088 (800–322–1088) and reporting by telephone.

Some adverse event reports (AERs) are required to be submitted to FDA (mandatory reporting), while other reporting is done voluntarily (voluntary reporting). Upon receipt of the report, it is directed to the FDA center responsible for ensuring the product's compliance with statutory requirements under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and/or any related authorities. Certain requirements regarding mandatory reporting of adverse events or product problems have been codified in Agency regulations, including those found in 21 CFR parts 310, 314, 514, 600, 803, 1114, and 1271.

We are revising the information collection to include electronic submission of AERs, currently approved in OMB control number 0910–0645. Most reports are submitted using the Electronic Submissions Gateway (ESG), our centralized system for securely receiving electronic submissions. Reports may also be submitted via the Safety Reporting Portal (SRP), found at *https://www.safetyreporting.hhs.gov/SRP2/en/Home.aspx?sid=c16bcd94-42a8-4a68-9272-df4a62d8462c,* which is intended to streamline the process of reporting product safety issues to FDA using ''Rational Questionnaires.''

II. MedWatch Reporting Forms

A. MedWatch Form FDA 3500 (Voluntary Reporting for Health Professionals)

Form FDA 3500 is used by healthcare professionals as well as consumers to submit all reports not mandated by Federal law or regulation. Individual health professionals are not required to submit reports with the exception of certain adverse reactions following immunization with vaccines as mandated by the National Childhood Vaccine Injury Act of 1986 (42 U.S.C. 300aa–1). Form FDA 3500 may be used to report serious adverse events, product problems, and product use errors and therapeutic failures. Reporting is supported for drugs, non-vaccine biologicals, medical devices, special nutritional products, cosmetics, and nonprescription (over-the-counter) human drug products marketed without an approved application. Form FDA 3500 may also be used to submit reports about tobacco products and dietary supplements.

B. MedWatch Form FDA 3500A (Mandatory Reporting)

Form FDA 3500A is used by manufacturers, user facilities, distributers, importers, and other respondents subject to mandatory reporting. Mandatory reporting of adverse events or product experiences is governed by statute and often codified in Agency regulations. Mandatory reporting of adverse reactions for human cells, tissues, and cellular- and tissue-based products is codified at 21 CFR 1271.350.

Reporting Under Sections 760 and 761 of the FD&C Act. The Dietary Supplement and Nonprescription Drug Consumer Protection Act of 2006 (Pub. L. 109–462) amended the FD&C Act by adding sections 760 and 761 (21 U.S.C. 379aa and 379aa–1). Section 760 of the FD&C Act defines ''adverse event'' and ''serious adverse event'' for nonprescription drugs and prescribes specific reporting requirements, submission timing, and associated recordkeeping. The final guidance document entitled ''Postmarketing Adverse Event Reporting for Nonprescription Human Drug Products Marketed Without an Approved Application,'' available for download at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/postmarketing-adverse-event-reporting-nonprescription-human-drug-products-marketed-without-approved,* discusses the statutory requirements and provides instructions on the reporting elements and the use of Form FDA 3500A. Similarly, section 761 of the FD&C Act defines ''adverse event'' and ''serious adverse event'' for dietary supplements and prescribes specific reporting requirements, submission timing, and associated maintenance of reporting records. The document entitled ''Guidance for Industry; Questions and Answers Regarding Adverse Event Reporting and Recordkeeping for Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act,'' available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-questions-and-answers-regarding-adverse-event-reporting-and-recordkeeping-dietary,* discusses these statutory requirements and provides instruction on the use and submission of Form FDA 3500A and discusses records required under section 761.

C. MedWatch Form FDA 3500B (Voluntary Reporting for Consumers)

Form FDA 3500B is a consumer-friendly version of Form FDA 3500 and is used for voluntary reporting. Respondents with access to the internet may visit our website at *https://www.fda.gov* and download Form FDA 3500B or contact us for assistance with completing and submitting the information. Form FDA 3500B is available in both English and Spanish.

III. FDA Safety Reporting Portal Rational Questionnaires

FDA currently receives several types of adverse event reports electronically via the SRP using rational questionnaires. These include:

1. Reportable Food Registry

Section 417 of the FD&C Act (21 U.S.C. 350f) defines ''reportable food'' and establishes reporting requirements for articles of foods (other than infant formula or dietary supplements) for which there is a reasonable probability that the use of, or exposure to, will cause serious adverse health consequences or death to humans or animals. We designed the reportable food registry (RFR) rational questionnaire to enable us to quickly identify, track, and remove from commerce an article of food (other than infant formula or dietary supplements) for which there is a reasonable probability that the use of, or exposure to, such article of food will cause

serious adverse health consequences or death to humans or animals. FDA's Center for Food Safety and Applied Nutrition uses the information to help ensure that these products are quickly and efficiently removed from the market to prevent foodborne illnesses. Both mandatory and voluntary RFR reports must be submitted via the SRP.

2. Food, Infant Formula, and Cosmetic Adverse Event Reports

Rational questionnaires have also been developed for submitting adverse event reports for dietary supplements, food, infant formula, and cosmetics.

3. Animal Food Adverse Event and Product Problem Reports

Section 1002(b) of the FDA Amendments Act of 2007 (Pub. L. 110–85) directs the Secretary to establish an early warning and surveillance system to identify adulteration of the pet food supply and outbreaks of illness associated with pet food. We developed the Pet Food Early Warning System rational questionnaire as a user-friendly data collection tool, as well as a questionnaire for collecting voluntary adverse event reports associated with livestock food. Information collected in these voluntary adverse event reports contributes to our ability to identify adulteration of the livestock food supply and outbreaks of illness associated with livestock food. We use the information collected to help ensure that such products are quickly and efficiently removed from the market to prevent foodborne illnesses.

4. Voluntary Tobacco Product Adverse Event and Product Problem Reports

The Center for Tobacco Products (CTP) has developed two voluntary rational questionnaires on the SRP. The first is utilized by consumers and concerned citizens to report tobacco product adverse event or product problems. A second rational questionnaire is used by tobacco product investigators in clinical trials with investigational tobacco products. Both CTP voluntary rational questionnaires capture tobacco-specific adverse event and product problem information from reporting entities such as healthcare providers, researchers, consumers, and other users of tobacco products.

In the **Federal Register** of June 30, 2021 (86 FR 34754), we published a 60-day notice requesting public comment on the proposed collection of information. One comment was received requesting clarification with regard to certain terms applicable to medical device reporting and exemptions from reporting. We note that information collection pertaining to medical device reporting is approved under OMB control number 0910–0437. The comment also discussed electronic reporting currently approved in OMB control number 0910–0645. Upon consideration of the comment and to help increase our organizational efficiency, we are consolidating the related reporting activities currently approved in OMB control number 0910–0645 into this single information collection request. Upon OMB approval of our request, we will discontinue OMB control number 0910–0645. In consideration of the comment, we have also proposed the following updates to the information collection instruments to help clarify information to be included in the corresponding data fields:

1. Revising the ''gender'' field to Forms FDA 3500, 3500A, and 3500B; to align with Centers for Disease Control and Prevention's use of these terms (*https://www.cdc.gov/hiv/clinicians/transforming-health/health-care-providers/collecting-sexual-orientation.html*), with the exception of the term ''Undifferentiated,'' which is included in the CDISC (Clinical Data Interchange Standards Consortium) language (premarket) standards (*https://www.cdisc.org/kb/articles/sex-and-gender*);

2. Revising Section B of Form FDA 3500 to the ''product problem'' field to include information about the root cause(s) of problem(s).

3. Revising instructions to clarify reporting instructions for paper-based reporting pertaining to adverse events associated with tobacco products; and

4. Revising instructions to clarify the term ''smoking'' refers to use of combusted products (cigarettes, cigars, pipes) to ''tobacco product use,'' which encompasses combusted and non-combusted tobacco products.

We estimate the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

FDA form	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Reportable Foods Registry—Mandatory Reports	875	1	875	0.6 (36 minutes)	525
Reportable Foods Registry—Voluntary Reports	5	1	5	0.6 (36 minutes)	3
Food, Infant Formula, and Cosmetic Adverse Event Reports.	1,165	1.2	1,398	0.6 (36 minutes)	839
Voluntary Dietary Supplement Adverse Event Reports.	360	1.2	432	0.6 (36 minutes)	259
Mandatory Dietary Supplement Adverse Event Reports.	80	12	960	1	960
Animal Food: Pet Food Reports	2,024	1	2,024	0.6 (36 minutes)	1,214.40
Animal Food: Livestock Food Reports	25	1	25	0.6 (36 minutes)	15
Voluntary Tobacco Product Health Problem or Product Problem (*i.e.*, adverse experience) Reports to SRP (both questionnaires).	204	1	204	0.6 (36 minutes)	122
Mandatory Tobacco Product Health Problem or Product Problem (*i.e.*, adverse experience) Reports.	1	1	1	0.6 (36 minutes)	1
Total			5,924		3,938.4

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimate of the number of respondents and the total annual responses is based primarily on mandatory and voluntary adverse event reports submitted to the Agency. The estimated total annual responses are based on initial reports. Followup reports, if any, are not counted as new reports. Based on our experience with

adverse event reporting, we assume it takes respondents 0.6 hour to submit a voluntary adverse event report via the SRP, 1 hour to submit a mandatory adverse event report via the SRP (except CTP, which estimates 0.6 hour), and 0.6 hour to submit a mandatory AER via the ESG (gateway-to-gateway transmission).

CTP used two data sources to estimate the reporting burden for tobacco product AEs. CTP researched the number of voluntary AE reports submitted to the center since the launch of the first tobacco questionnaire in the SRP in 2014. Our records indicated a total of 1,426 initial reports over the last 7 full calendar years. We used the total number of reports to average the number of yearly reports to 204. As referenced above, the premarket tobacco product application rule requires firms to submit adverse experience reports for tobacco products with marketing orders. The burden for these mandatory reports has been approved under OMB control number 0910–0879. For this collection, we have included 1 hour to acknowledge the inclusion under this collection. Therefore, the estimate for CTP voluntary and mandatory reports is expected to be 123 hours.

The submission of mandatory reports associated with drug products and biological drug products is accounted for and approved under OMB control number 0910–0230; the submission of mandatory reports associated with the Vaccine Adverse Event Reporting System is accounted for and approved under OMB control number 0910–0308; medical device report submissions are accounted for and approved under OMB control number 0910–0437; and the submission of mandatory reports associated with animal drug products is accounted for and approved under OMB control number 0910–0284.

Dated: March 7, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05514 Filed 3–15–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–D–0398]

Human Gene Therapy Products Incorporating Human Genome Editing; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft document entitled ''Human Gene Therapy Products Incorporating Human Genome Editing; Draft Guidance for Industry.'' The draft guidance document provides recommendations to sponsors developing human gene therapy products incorporating genome editing (GE) of human somatic cells. Specifically, the guidance provides recommendations regarding information that should be provided in an investigational new drug (IND) application in order to assess the safety and quality of the investigational GE product, including information on product design, product manufacturing, product testing, preclinical safety assessment, and clinical trial design.

DATES: Submit either electronic or written comments on the draft guidance by June 14, 2022 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–D–0398 for ''Human Gene Therapy Products Incorporating Human Genome Editing; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance document entitled ''Human Gene Therapy Products Incorporating Human Genome Editing; Draft Guidance for Industry.'' The draft guidance document provides recommendations to sponsors developing human gene therapy products incorporating GE of human somatic cells. Specifically, the guidance provides recommendations regarding information that should be provided in an IND application in order to assess the safety and quality of the investigational GE product as required in 21 CFR 312.23. This includes information on product design, product manufacturing, product testing, preclinical safety assessment and clinical trial design.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of another human gene therapy draft guidance document entitled ''Considerations for the Development of Chimeric Antigen Receptor (CAR) T Cell Products; Draft Guidance for Industry.''

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Human Gene Therapy Products Incorporating Human Genome Editing.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR parts 210 and 211 have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 1271 have been approved under OMB control number 0910–0543.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents/* or *https://www.regulations.gov.*

Dated: March 10, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05538 Filed 3–15–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; PAR19–319: NIDDK Central Repositories Non-renewable Sample Access (X01).

Date: May 6, 2022.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma S. Begum, Ph.D. Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health Room, 7349, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 11, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05562 Filed 3–15–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Characterization of Islet-derived Extracellular Vesicles for Improved Detection, Monitoring, Classification, and Treatment of Type 1 Diabetes Special Emphasis Panel.

Date: April 6, 2022.

Time: 12:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Peter J. Kozel, Ph.D., Chief, Training and Mentored Research Section, Scientific Review Branch, Division of Extramural Activities, 6707 Democracy Blvd., Room 7009, Bethesda, MD 20892, *kozelp@mail.nih.gov,* 301–594–4721.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 11, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05559 Filed 3–15–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Mental Health Special Emphasis Panel, March 24, 2022, 9:00 a.m. to March 24, 2022, 5:00 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD, 20852, which was published in the **Federal Register** on February 28, 2022, FR DOC 2022–04158, 87 FR 11080.

This notice is being amended to change the date from March 24, 2022, to April 5, 2022. Meeting time and location remain the same. The meeting is closed to the public.

Dated: March 11, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05563 Filed 3–15–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Ruth L. Kirschstein National Research Service Award (NRSA) Institutional Research Training Grant (Parent T32).

Date: March 25, 2022.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Rockville, MD 20852, 240–507–9685, *thomas.conway@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: March 11, 2022.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05560 Filed 3–15–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; National Center for Advancing Translational Sciences Special Emphasis Panel.

Date: April 14, 2022.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Suite 1037, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alumit Ishai, Ph.D., Scientific Review Officer, Office of Grants Management and Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Suite 1037, Bethesda, MD 20892, 301–496–9539, *alumit.ishai@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: March 10, 2022.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05485 Filed 3–15–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Enhanced Transparency and Access to Information for Debtors and Sureties in the Automated Commercial Environment

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) is making three enhancements to CBP's debt management processes to increase transparency and access to information for debtors and sureties. One of the enhancements will support importers of record, licensed customs brokers, and other Automated Commercial Environment (ACE) account users who owe debts to CBP by enabling the electronic viewing of bill sanction status and protest details in the unpaid, open bill details report in ACE. The other two enhancements will facilitate compliance for sureties by providing electronic access to the

monthly report listing open delinquent bills by importer name (*i.e.,* the Formal Demand on Surety for Payment of Delinquent Amounts Due, also informally referred to as the 612 Report) in ACE (in lieu of CBP emailing this information to sureties) and improving the content and design of the mailed 612 Report.

DATES: On March 21, 2022, CBP will deploy updates to enable the electronic viewing of bill sanction status and protest details in the unpaid, open bill details report in ACE. Additionally, on May 1, 2022, sureties may begin to view the electronic 612 Report in ACE (in lieu of CBP emailing this information to sureties) and CBP will transition to the updated mailed 612 Report.

ADDRESSES: Comments concerning this notice may be submitted at any time via email to the ACE Collections Team, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, at *ACECollections@cbp.dhs.gov,* with a subject line identifier reading ''ACE Collections Debt Management Release.''

FOR FURTHER INFORMATION CONTACT: Steven J. Grayson, Program Manager, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, at (202) 579–4400, or *steven.j.grayson@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Ongoing Modernization of the Collections System at U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) is modernizing its collections system, allowing CBP to eventually retire the Automated Commercial System (ACS) and transfer all collections processes into the Automated Commercial Environment (ACE). This modernization effort, known as ACE Collections, includes the consolidation of the entire collections system into the ACE framework, which will enable CBP to utilize trade data from ACE modules, benefitting both the trade community and CBP with more streamlined and better automated payment processes. The new collections system in ACE will reduce costs for CBP, create a common framework that aligns with other initiatives to reduce manual collection processes, and provide additional flexibility to allow for future technological enhancements. ACE Collections will also provide the public with more streamlined and better automated payment processes with CBP, including better visibility into data regarding specific transactions.

ACE Collections supports the goals of the Customs Modernization Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act), of modernizing the business processes that are essential to securing U.S. borders, speeding up the flow of legitimate shipments, and targeting illicit goods that require scrutiny. ACE Collections also fulfills the objectives of Executive Order 13659 (79 FR 10655, February 25, 2014), to provide the trade community with an integrated CBP trade system that facilitates trade, from entry of goods to receipt of duties, taxes, and fees.

CBP is implementing ACE Collections through phased releases in ACE. Release 1, which was deployed on September 7, 2019, dealt with statements integration, the collections information repository (CIR) framework, and ACH (automated clearinghouse) processing. *See* 84 FR 46749 and 84 FR 46678 (September 5, 2019), and 84 FR 49650 (September 23, 2019). Release 2 was deployed on February 5, 2021, and focused on non-ACH electronic receivables and collections, for Fedwire and *Pay.gov,* that included user fees, Harbor Maintenance Fee (HMF), and Seized Assets and Case Tracking System (SEACATS) payments. All of the changes in Release 2 were internal to CBP and did not affect the trade community. Release 3 was deployed on May 1, 2021, and primarily implemented technical changes to the liquidation process, and deferred tax bills, that were internal to CBP. Release 3 also harmonized the determination of the due date for deferred tax payments with the entry summary date, streamlined the collections system, and provided importers of record with more flexibility and access to data when making deferred payments of internal revenue taxes owed on distilled spirits, wines, and beer imported into the United States. *See* 86 FR 22696 (April 29, 2021). Release 4 was deployed on October 18, 2021, and primarily implemented technical changes to the production and management of the internal CBP processes for supplemental bills, certain reimbursable bills, and non-reimbursable/miscellaneous bills issued by CBP to the public. *See* 86 FR 56968 (October 13, 2021). Release 4 also made available to importers of record, licensed customs brokers, and other ACE account users, an option to electronically view certain, unpaid, open bill details as reports in ACE Reports and adopted a new, enhanced format for the CBP Bill Form. *See id.*

As explained more fully below, Release 5 will be deployed on March 21, 2022, with delayed implementation for the enhancements concerning the Formal Demand on Surety for Payment of Delinquent Amounts Due (also informally referred to as the 612 Report) until May 1, 2022. Release 5 focuses on debt management processes, and it includes mainly internal, technical changes to the production, tracking, and management of overdue bills and delinquent accounts and the bonds associated with them. Release 5 also includes enhancements that improve transparency and access to information through ACE for importers of record, licensed customs brokers, and other ACE account users who owe debts to CBP, as well as for the sureties who guarantee the bonds to secure the payment of the debts, if applicable. Additional releases for ACE Collections will follow, and any further changes affecting the public will be announced by notice in the **Federal Register**, as needed.

B. Overview of CBP's Debt Management Processes Affected by Release 5 of ACE Collections

CBP is authorized to collect duties, taxes, and fees from customs activities. *See generally* 19 U.S.C. 58a, 58b, 58b–1, 58c, 1505; 26 U.S.C. 4461. The regulations found in part 24 of title 19 of the Code of Federal Regulations (CFR) address the financial and accounting procedures for when CBP collects the duties, taxes, fees, interest, and other applicable charges from the public due to customs activities. *See generally* 19 CFR 24.1 through 24.36. Members of the public are informed of existing debts to CBP through the physical mailing of the CBP Bill Form, the data elements of which are also available for electronic viewing in ACE Reports.

CBP is authorized to require such bonds or other security as deemed necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction. *See* 19 U.S.C. 1623. The regulations concerning such bonds are set forth generally in part 113 of title 19 of the CFR, which addresses bond approval and execution, bond conditions, general and special bond requirements, etc. Bonds are required for a large percentage of the activities for which CBP produces bills. *See* 19 CFR 113.61 through 113.75. For example, CBP requires bonds for the importation of merchandise (19 CFR 113.62), accelerated payment of drawback

refunds (19 CFR 113.65), and operation of a foreign trade zone (19 CFR 113.73).[1]

CBP recognizes bonds and the parties to those bonds, who are the principals and sureties, through the filing of a CBP Bond (CBP Form 301) and its addendums.[2] Bond information may be filed electronically, pursuant to 19 U.S.C. 1623(b), via any CBP authorized electronic data interchange (EDI) system. CBP currently accepts the electronic filing of bonds through the eBond test program, 79 FR 70881 (Nov. 28, 2014) and 80 FR 899 (Jan. 7, 2015), which was most recently extended in a **Federal Register** notice, 83 FR 12403, on March 21, 2018.[3] When a debtor/bond principal fails to pay a debt owed to CBP that is secured by a bond, CBP may seek to collect from the surety (and any other co-sureties or liable parties) under the bond. *See, e.g.,* 19 CFR 113.3 and 144.2. Additionally, the bond principal(s) and the surety(ies) are jointly and severally liable to CBP, as set forth in the bond conditions. *See* 19 CFR part 113, subpart G.

CBP's debt management processes begin when a debt becomes delinquent, and then involves incrementally escalating consequences when a debtor/bond principal does not make full payment. Generally, a debtor/bond principal has 30 days to make payment after the ''bill date'' (also known as the ''date of issuance of the bill''), appearing on the CBP Bill Form, before the bill ''due date'' (also known as the ''late payment date''). 19 CFR 24.3(e). On the 31st day after the bill date, the bill is considered delinquent, and interest will accrue in 30-day increments. 19 U.S.C. 1505(d); 19 CFR 24.3a. Thirty (30) days after the bill due date (60 days after the bill date), CBP will list the bill for the first time on the Formal Demand on Surety for Payment of Delinquent Amounts Due (also informally referred to as the 612 Report, which is a monthly report listing open delinquent bills by importer name) to the sureties (and any co-sureties) recognized on the bond that secures the delinquent debt. 19 CFR 24.3a(d)(2)(i). The elements that normally appear in the 612 Report are prescribed in 19 CFR 24.3a(d)(2).

Generally, CBP will mail the debtor/bond principal a dunning letter if the debt remains unpaid for 120 days after the bill date (90 days after the bill due date). The dunning letter warns of further consequences if the bill remains unpaid, such as the imposition of national sanction, informs about protest rights, and provides the recipient with another copy of the details of outstanding debts owed, for which a dunning letter has not been sent before.

Generally, if a debt continues to remain unpaid by the debtor/bond principal, CBP will email the sureties on the applicable bond a surety demand follow-up letter that seeks payment of all overdue debt secured by a bond. In addition, the debtor/bond principal may be subject to additional consequences, such as a requirement to file the entry summary with payment of estimated duties, taxes, and fees attached before CBP will release new entries (informally referred to as importer sanction or national sanction).[4] *See, e.g.,* 19 CFR 142.13, 142.14, 142.26. Ultimately, CBP may take further actions against the surety and/or the debtor/bond principal in an effort to collect the unpaid debt. It should be noted that, under certain circumstances, the debtor/bond principal and/or surety may file an administrative protest of certain decisions by CBP, including the issuance of and basis for certain bills. *See* 19 U.S.C. 1514, 1515. CBP's regulations governing administrative protests may be found at 19 CFR part 174. The timely filing of an administrative protest may alter CBP's debt management approach that is generally described in the preceding paragraphs.[5]

Altogether, CBP's debt management processes often entail numerous mailings and deadlines for CBP and the trading public. CBP has thus developed new tools to automate, streamline, and simplify the processes for debt collection and protest tracking as part of Release 5. The resulting benefits to the public that are announced in this document will be deployed and implemented on March 21, 2022, with delayed implementation for the enhancements concerning the 612 Report until May 1, 2022.

II. Enhancements to the Debt Management Processes

Additionally, CBP is announcing three enhancements to the debt management processes to increase transparency and access to information for the public as part of Release 5. One of the enhancements will support importers of record, licensed customs brokers, and other ACE account users who owe debts to CBP by enabling the electronic viewing of whether a bill has caused consequences under 19 CFR 142.13, 142.14, and 142.26 (informally referred to as bill sanction status or sanction status) and protest details in the unpaid, open bill details report in ACE. The other two enhancements will facilitate compliance for sureties by providing electronic access to the 612 Report in ACE (in lieu of CBP emailing this information to sureties) and improving the content and design of the 612 Report.

A. Supplementation of Unpaid, Open Bill Details in ACE Reports To Enable Electronic Viewing of Sanction Status and Protest Details for Importers of Record, Licensed Customs Brokers, and Other ACE Account Users Who Owe Debts to CBP

CBP sends physical bills on the CBP Bill Form[6] via mail to officially notify individuals and entities of amounts owed for duties, taxes, fees, and other charges. Upon the deployment of Release 4 on October 18, 2021, ACE account users were able to electronically view the data elements appearing on the CBP Bill Form in ACE Reports for certain categories of unpaid, open bills. 86 FR 56968 (October 13, 2021). The unpaid, open bill details report in ACE Reports provides an ACE account user with a consolidated, electronic report to track its open bills for which payment is owed to CBP. As part of Release 5, CBP is supplementing the unpaid, open bill details report in ACE Reports with new information applicable to sanction status and protest details for each bill appearing on the report.

Specifically, the new report information includes five data elements. The first data element is an indicator as to whether the unpaid, open bill has put the account holder on national sanction. The other four data elements are details related to administrative protests filed pursuant to 19 CFR part 174. If an

[1] In certain circumstances, bond requirements can be waived. *See, e.g.,* 19 CFR 10.31(f), 10.101(d), 142.4(c).

[2] A copy of CBP Form 301 and its addendums may be viewed online at *https://www.cbp.gov/trade/priority-issues/revenue/bonds.*

[3] Only a surety or a surety agent may submit an eBond, and additional information about the eBond test program and how to participate may be found online at *https://www.cbp.gov/trade/priority-issues/revenue/bonds/ebond.*

[4] Additional information on the potential consequences for the debtor/bond principal may be found online at *https://www.cbp.gov/trade/priority-issues/revenue/bill-payments/importer-sanctions.*

[5] Generally, within 180 days of liquidation or other protestable decision made by CBP, the surety or debtor/bond principal may file a protest against that decision. Sureties may also file a protest within 180 days of the date of mailing of the first 612 Report concerning the specific bill or unsatisfied legal claim secured by the surety bond. An administrative protest must be made on CBP Form 19 and may be filed in paper or electronically in ACE. Under certain circumstances, the protesting party may seek further review of a protest. Following the filing of a protest, CBP will review and respond. *See* subpart C of 19 CFR 174.

[6] As CBP advised in the **Federal Register** notice that announced Release 4, the CBP Bill Form for physical bills will remain the primary source of legal notice of monies owed due to customs activity, as required by 19 CFR 24.3(a).

administrative protest is associated with an open, unpaid bill, then the following data elements will be included in the report: The protest number, the date of filing of the protest, the processing status of the protest, and the date of CBP's decision on the protest (if applicable). All of the new data elements will be included in additional columns added to the unpaid, open bill details report in ACE Reports and will be updated within one business day after the initial processing of sanction status and/or the relevant administrative protest information. It is important to note that any mailed or electronically communicated information provided by CBP regarding the sanction status and protest details may supersede the information appearing in ACE Reports.

Only members of the public who have an ACE Portal account can view their unpaid, open bill details report in ACE Reports, which will include the new information applicable to sanction status and protest details as of March 21, 2022. CBP encourages affected members of the public (including, but not limited to, importers of record and licensed customs brokers) who do not already have an ACE Portal account to apply for access to be able to view the necessary data to make timely bill payments.[7] CBP will provide any needed support for setting up ACE Portal accounts. The public may access the ACE Reports application through the ACE Secure Data Portal at *https://ace.cbp.dhs.gov*.[8] Within ACE Reports, ACE account users may navigate to and access their unpaid, open bill details reports in the Workspace Module.[9]

B. Benefits for Sureties

1. Availability of an Option for Sureties to Electronically View 612 Reports in ACE

Currently, CBP mails to sureties the 612 Reports, which are a monthly listing of open delinquent bills by importer name.[10] The 612 Reports constitute the Formal Demand on Surety for Payment of Delinquent Amounts Due, as required by 19 CFR 24.3a(d)(2). Each 612 Report contains certain information, such as the bill number and principal amount due, to allow sureties to identify and track their obligations. *Id.* In addition to mailing 612 Reports, CBP makes available to sureties the ability to request and receive via email a downloadable copy of the raw data underlying the most recent 612 Report sent to them by mail.

As part of Release 5, CBP will make available to sureties an option to electronically view 612 Reports in ACE (in lieu of CBP emailing this information to sureties).[11] This new option will, *inter alia,* reduce the amount of time sureties spend manually identifying and tracking their obligations to CBP, and will allow sureties to access their report at any time of the month, eliminating the constraint of having access to the data the first day it is generated. Moreover, this new option will significantly reduce the current burden on CBP associated with the emailing of the 612 Reports to the respective sureties. The default data presented in the electronic 612 Report will be for the most recent month's mailed 612 Report. Sureties will also be able to view data from, at a minimum, three previous monthly electronic 612 Reports, but such data will not remain available indefinitely in ACE.

The electronic 612 Reports will only update on, approximately, the first day of every month to ensure the data appearing in the electronic 612 Reports will match the data appearing in the mailed 612 Reports. The data elements appearing in the electronic 612 Reports will be the same as the data elements appearing in the mailed 612 Reports, including the new element described below.

It is important to note that CBP will continue its current processes for mailing the 612 Reports, which remain the official notice to sureties as required by 19 CFR 24.3a(d). Information and data that appear on the mailed 612 Report will supersede the data elements that appear in the electronic 612 Reports, and sureties should continue to consult the mailed 612 Reports to determine the extent of their legal obligations. Moreover, only sureties who have an ACE Portal account will be able to view their electronic 612 Reports that will be available in ACE Reports beginning on May 1, 2022. CBP encourages sureties who do not already have an ACE Portal account to apply for access to be able to electronically view their 612 Reports.[12]

2. Minor Modifications to the Information in and Appearance of the Mailed 612 Reports

As part of Release 5, there will be minor modifications to the information in and appearance of the mailed 612 Report. The mailed 612 Report will continue to have the same structure and provide the same information as it does now, but CBP will add a new data element and column, the ''Bill Version #'', which is intended to help sureties track whether a certain bill's information is current.[13] In addition, the mailed 612 Report will no longer be printed on paper with a green bar. Instead, as of May 1, 2022, the mailed 612 Report will be printed on more common legal landscape paper.

Dated: March 9, 2022.

Jeffrey Caine,

Chief Financial Officer, U.S. Customs and Border Protection.

[FR Doc. 2022–05547 Filed 3–15–22; 8:45 am]

BILLING CODE 9111–14–P

[7] The step-by-step instructions to apply for an ACE Portal account are available online at *https://www.cbp.gov/trade/automated/getting-started/portal-applying.*

[8] For more information about accessing, navigating, and personalizing ACE Reports, please review the ACE Reports Trainings online at *https://www.cbp.gov/trade/ace/training-and-reference-guides.*

[9] The Workspace Module is a window in ACE Reports that provides ACE account users access to their standard reports categorized by subject area (such as Cargo Release, Entry Summary, Manifest, etc.) and includes a navigation list (a folder structure of standard reports) and a viewer that displays the report selected. For additional information about the Workspace Module, please consult the specific ACE Report training at *https://www.cbp.gov/trade/ace/training-and-reference-guides* or the quick reference card at *https://www.cbp.gov/document/guidance/ace-reports-qrc-navigating-workspace-module.*

[10] A new bill entry is added to a 612 Report when a bill owed to CBP has not been paid and is more than 30 days past due (approximately 60 days after the initial bill date). CBP generates and mails the 612 Report to the surety at the beginning of every month, and each bill listed will remain on the 612 Report until that bill is paid or otherwise closed. 19 CFR 24.3a(d)(2)(i).

[11] CBP will discontinue the option for sureties to request, through CBP's Office of Finance, Revenue Division, the regular emailing of 612 Report data packets, as of May 1, 2022. The downloadable data packets are a function of ACS, which will become obsolete, and the existence of the option to electronically view 612 Reports supersedes the emailing of data packets (as the same information will be downloadable from ACE).

[12] CBP will provide any needed support for setting up ACE Portal accounts. *See supra* footnotes 7–9 for more information about creating ACE Portal accounts, navigating ACE Reports, and accessing 612 Reports in the Workspace Module.

[13] CBP assigns bills a specific number that corresponds to a bill as it existed at a specific point in time. Bills change due to recalculation of interest, partial payment, etc. and CBP updates the bill version number when a bill changes. For 612 Reports, the ''Bill Version #'' will correspond to the bill as it existed at the time that the mailed 612 Report was generated.

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0NEW]

CBP Hiring Center Medical Records Release Privacy Act Form

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; this is a new collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 16, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0NEW in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: CBP Hiring Center Medical Records Release Privacy Act Form.

OMB Number: 1651–0NEW.

Form Number: N/A.

Current Actions: This is a new information collection.

Type of Review: New.

Affected Public: Individuals.

Abstract: In accordance with 5 CFR 339.301, Customs and Border Protection (CBP) performs pre-employment medical evaluations on all candidates tentatively selected to fill positions that include a medical requirement, such as the CBP Officer and Border Patrol Agent positions. During that evaluation process, CBP collects medically relevant information about the candidate from: The candidate, CBP's contracted medical providers, and/or the candidate's personal medical and mental health providers.

In accordance with 5 CFR 339.305, CBP makes all medical documentation and records of examination available to the candidates. Candidates can request copies of their pre-employment medical examination results and supporting documentation/records by email or letter. Due to the sensitive nature of the information being released, CBP requires that candidates complete and sign a privacy release authorization form in order to receive a copy of their medical documents. CBP will only share medical information directly with the candidate, or with a third party when authorized to do so in writing by the candidate.

No specific information is needed to request copies of candidates' medical documents in writing. When completing the release form, candidates must provide the following information: Full name, partial Social Security Number (SSN#), Date of Birth, Current Address, Email Address, Phone Number; as well as specifying the type of medical records to be released (hearing test results, vision test results, etc.).

This information is used by CBP as confirmation that the agency has the candidate's signed authorization to provide medically related records about the candidate. A copy of that signed authorization and the records released are retained within the candidate's pre-employment file.

Type of Information Collection: Medical Records Release Privacy Act Form.

Estimated Number of Respondents: 104.

Estimated Number of Annual Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 208.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 52 hours.

Dated: March 10, 2022.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2022–05479 Filed 3–15–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7052–N–02; OMB Control No. 2506–0195]

60-Day Notice of Proposed Information Collection: Rural Capacity Building

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* May 16, 2022.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–4300 (this is not a toll-free number) or email at *Collette.Pollard@hud.gov* for a copy

of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Anupama Abhyankar, Management and Program Analyst, CPD, Department of Housing and Urban Development, 451 7th Street SW, Room 7143, Washington, DC 20410; email Anupama Abhyankar at *Anupama.v.Abhyankar@hud.gov* telephone 202–402–3981, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Abhyankar.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Rural Capacity Building.

OMB Approval Number: 2506–0195.

Type of Request: Revision of a currently approved collection.

Form Number: SF–424, SF–424B, SF–LLL, HUD 2880, HUD 4130.

Description of the need for the information and proposed use: The Rural Capacity Building for Community Development and Affordable Housing (RCB) program and the funding made available have been authorized by the Annual Appropriations Acts each year since FY 2012. The RCB program enhances the capacity and ability of rural housing development organizations, Community Development Corporations (CDCs), Community Housing Development Organizations (CHDOs), local governments, and Indian tribes (eligible beneficiaries) to carry out affordable housing and community development activities in rural areas for the benefit of low- and moderate-income families and persons. The RCB program achieves this by funding National Organizations with expertise in rural housing and rural community development who work directly to build the capacity of eligible beneficiaries. Applicants to the RCB program are required to submit certain information as part of their application for assistance, and as part of the requirements as a grantee.

Estimated Number of Respondents: 20 respondents.

Estimated Number of Responses: 20 responses.

Frequency of Response: Once a year.

Average Hours per Response: 44.25 hours.

Total Estimated Burdens: 885.00 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Principal Deputy Assistant Secretary for Community Planning and Development, James Arthur Jemison II, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Aaron Santa Anna, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Aaron Santa Anna,

Federal Liaison for the Department of Housing and Urban Development.

[FR Doc. 2022–05498 Filed 3–15–22; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX19ZQ00G402A00; OMB Control Number 1028–NEW]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; ShakeAlert

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is proposing a new information collection without OMB approval.

DATES: Interested persons are invited to submit comments on or before April 15, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Comments may also be sent by mail to the U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–NEW in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this information collection request (ICR), contact Sara McBride by email at *smcbride@usgs.gov* or by telephone at 650–750–5270. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 17, 2019, (84 FR 34198. No comments were received.

As part of our continuing effort to reduce paperwork and respondent

burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: This information is being collected for the purposes of understanding (1) the continued feasibility of implementation of ShakeAlert-powered alerts through the Wireless Emergency Alerts via the Integrated Public Alerts and Warning System (IPAWS) managed by the Federal Emergency Management Agency, and (2) the latency of transmissions in California, Oregon, and Washington. This collection is critical to determine technological latencies of the Integrated Public Alerts and Warning System, managed by FEMA and used by the U.S. Geological Survey to send ShakeAlert-powered alerts. Better understanding is required to know how much time people will have to take protective actions once they receive an alert. Further, knowledge of where the latencies exist and why can help us improve and streamline our systems. This involves live testing of the system with a population reporting back to us.

Title of Collection: ShakeAlert.

OMB Control Number: 1028–NEW.

Form Number: None.

Type of Review: In Use Without an OMB Control Number.

Respondents/Affected Public: Individual households.

Total Estimated Number of Annual Respondents: 1,000.

Total Estimated Number of Annual Responses: 1,000.

Estimated Completion Time per Response: 7 minutes.

Total Estimated Number of Annual Burden Hours: 117,

Respondent's Obligation: Voluntary,

Frequency of Collection: Bi-annually.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Shane Detweiler,

Assistant Center Director, Earthquake Science Center, Southwest Region.

[FR Doc. 2022–05557 Filed 3–15–22; 8:45 am]

BILLING CODE 4338–18–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[2231A2100DD/AAKC001030/ A0A501010.999900; OMB Control Number 1076–0020]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Loan Guarantee, Insurance, and Interest Subsidy Program

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Assistant Secretary—Indian Affairs (AS–IA) are proposing to revise an information collection.

DATES: Interested persons are invited to submit comments on or before April 15, 2022.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov*; or via facsimile to (202) 395–5806. Please provide a copy of your comments to Steven Mullen, Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1001 Indian School Road NW, Suite 229, Albuquerque, New Mexico 87104; or by email to *comments@bia.gov.* Please reference OMB Control Number 1076–0020 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, please contact David Johnson by telephone at: (202) 208–3026. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on September 21, 2021 (86 FR 52491). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Submission of this information allows the Office of Indian Economic Development (OIED) to implement the Loan Guarantee, Insurance, and Interest Subsidy Program, 25 U.S.C. 1451 *et seq.,* the purpose of which is to encourage private lending to individual Indians and Indian organizations by providing lenders with loan guarantees or loan insurance to reduce their potential risk. The information collection allows OIED to determine the eligibility and credit-worthiness of respondents and loans and otherwise ensure compliance with Program requirements. This information collection includes the use of several forms.

Title of Collection: Loan Guarantee, Insurance, and Interest Subsidy Program.

OMB Control Number: 1076–0020.

Form Number: LGA10, LIA10, RGI10, ISR10, NOD10, CFL10, ALD10, NIL10, and LGC10.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Lenders, including commercial banks, and borrowers, including individual Indians and Indian organizations.

Total Estimated Number of Annual Respondents: 622.

Total Estimated Number of Annual Responses: 1,377.

Estimated Completion Time per Response: Ranging from 0.5 to 2 hours.

Total Estimated Number of Annual Burden Hours: 2,654 hours.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Steven Mullen,

Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2022–05566 Filed 3–15–22; 8:45 am]

BILLING CODE 4337–15–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1228]

Certain Automated Storage and Retrieval Systems, Robots, and Components Thereof; Notice of a Commission Determination To Review in Part a Final Initial Determination and Order No. 33; and, on Review, To Find No Violation of Section 337 Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's (''ALJ'') final initial determination (''ID'') issued on December 13, 2021, finding no violation of section 337, and Order No. 33 (''*Markman* Order''), issued on July 22, 2021, in the above-referenced investigation. On review, the Commission has determined to find no violation of section 337. The investigation is terminated in its entirety.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone 202–205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 6, 2020, based on a complaint filed on behalf of AutoStore Technology AS of Norway; AutoStore AS of Norway; and AutoStore System Inc. of Derry, New Hampshire (collectively, ''Complainants''). 85 FR 71096 (Nov. 6, 2020). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain automated storage and retrieval systems, robots, and components thereof by reason of infringement of claims 1–6 of U.S. Patent No. 10,093,525 (''the '525 patent''); claims 1 and 18–20 of U.S. Patent No. 10,294,025 (''the '025 patent''); claims 1–4 and 11–15 of U.S. Patent No. 10,474,140 (''the '140 patent''); claims 1, 2, and 5–15 of U.S. Patent No. 10,494,239 (''the '239 patent''); and claim 19 of U.S. Patent No. 10,696,478 (''the '478 patent''). *Id.* The complaint further alleged that a domestic industry exists. *Id.* The Commission's notice of investigation named eight respondents: Ocado Group Plc; Ocado Central Services Ltd.; Ocado Innovation Ltd.; Ocado Operating Ltd.; Ocado Solutions, Ltd.; Tharsus Group Ltd.; and Printed Motor Works Ltd., all of the United Kingdom; and Ocado Solutions USA Inc. of Tysons Corner, Virginia (collectively, ''Respondents''). *Id.* at 71097. The Office of Unfair Import Investigations did not participate as a party in this investigation. *Id.*

Respondent Printed Motor Works Ltd. was terminated from the investigation based on withdrawal of allegations in the complaint. *See* Order No. 19, at 1 (June 2, 2021), *unreviewed by* Comm'n Notice (June 22, 2021).

The asserted claims of the '140 patent and claims 1 and 18 of the '025 patent were terminated from the investigation. *See* Order No. 59 (August 9, 2021), *unreviewed by* Comm'n Notice (Aug. 20, 2021). Complainants' allegations that Respondents' 500 series robot and redesigned 500 series robot infringe claims 19 and 20 of the '025 patent were also terminated from the investigation. *Id.*

The *Markman* Order, issued on July 22, 2021, construed claim terms from all five asserted patents. *See* Order No. 33 (July 22, 2021). The *Markman* Order found claims 2 and 3 of the '525 patent and claims 5, 6, 14, and 15 of the '239 patent to be indefinite. *Id.* at 35–39.

An evidentiary hearing was held on August 2–6, 2021.

On December 13, 2021, the ALJ issued the final ID finding no violation of section 337 and his recommended determination (''RD''). Specifically, the ID found the accused products infringe claims 1 and 6 of the '525 patent; claims

1, 2, and 7–13 of the '239 patent; and claim 19 of the '478 patent; but those claims are invalid for failure to comply with the written description requirement and the enablement requirement of 35 U.S.C. 112, para. 1. The ID also found claims 4 and 5 of the '525 patent invalid as indefinite under 35 U.S.C. 112, para. 2, because they depend from claims 2 and 3 of the '525 patent, which the ALJ found indefinite in the *Markman* Order. As for the '025 patent, the ID found the accused products do not infringe claims 19 and 20 and the claims have not been shown to be invalid. The ID further found that Complainants have shown that the domestic industry requirement has been satisfied with respect to the asserted patents under section 337(a)(3)(B).

The parties filed a joint motion to extend the time for them to file petitions for review from December 27, 2021 (with responses due January 4, 2022) to December 30, 2021 (with responses due January 10, 2022). On December 14, 2021, the Chair granted the motion.

On December 30, 2021, Complainants and Respondents filed separate petitions for review of the ID. On January 10, 2022, they filed separate replies to the petitions for review.

The Commission solicited submissions from the public on public interest issues raised by the recommended determination. On January 14, 2022, the Kroger Co. submitted comments on the public interest for the Commission to consider should the Commission find a violation.

Having reviewed the record of the investigation, including the final ID, the *Markman* Order, and the parties' submissions, the Commission has determined to review in part the final ID and the *Markman* Order. Specifically, the Commission has determined to review: (1) The ALJ's construction of the terms ''vehicle body'' and ''a plurality of [rolling members/wheels] attached to the vehicle body'' in the asserted claims of the '525, '239, and '478 patents; (2) the ID's finding that claims 2–5 of the '525 patent and claims 5, 6, 14, and 15 of the '239 patent are invalid as indefinite; (3) the ID's construction of the term ''a displacement motor'' in claim 1 of the '025 patent; and (4) the ID's findings that the economic prong of the domestic industry is satisfied. Among other findings, the Commission has determined not to review the ID's finding that the asserted claims of the '525, '239, and '478 patents are invalid for failing to comply with the written description and enablement requirements of 35 U.S.C. 112, para. 1.

On review, the Commission affirms with modification the ALJ's construction of the terms ''vehicle body'' and ''a plurality of [rolling members/wheels] attached to the vehicle body'' in the claims of the '525, '239, and '478 patents. The Commission also affirms the ALJ's finding of indefiniteness with respect to certain claims of the '525 and '239 patents and the ID's construction of the term ''a displacement motor'' in claim 1 of the '025 patent with the additional analyses provided in its opinion. Having adopted the ID's findings that the asserted claims of the '525, '239, and '478 patents are invalid and the asserted claims of the '025 patent are not infringed, the Commission has determined to take no position on the economic prong of the domestic industry requirement.[1] Accordingly, the Commission has determined to affirm with modifications the ID's finding of no violation of section 337. The investigation is terminated in its entirety. The Commission's reasoning in support of its determination is set forth more fully in its opinion.

The Commission vote for this determination took place on March 10, 2022.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: March 10, 2022.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2022–05504 Filed 3–15–22; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Meeting of the Compact Council for the National Crime Prevention and Privacy Compact

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: Meeting notice.

SUMMARY: The purpose of this notice is to announce a meeting of the National Crime Prevention and Privacy Compact Council (Council) created by the National Crime Prevention and Privacy Compact Act of 1998 (Compact).

DATES: The Council will meet in open session from 8:30 a.m. (EDT) until 5:00 p.m. (EDT) on May 12, 2022.

ADDRESSES: The meeting will take place at the Florida Hotel and Conference Center, 1500 Sand Lake Road, Orlando, Florida, 32809.

FOR FURTHER INFORMATION CONTACT: Inquiries may be addressed to Mrs. Chasity S. Anderson, FBI Compact Officer, Biometric Technology Center, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, telephone 304–625–2803.

SUPPLEMENTARY INFORMATION: Thus far, the Federal Government and 34 states are parties to the Compact which governs the exchange of criminal history records for licensing, employment, immigration and naturalization matters, and similar purposes. The Compact also provides a legal framework for the establishment of a cooperative federal-state system to exchange such records.

The United States Attorney General appoints 15 persons from state and federal agencies to serve on the Council. The Council will prescribe system rules and procedures for the effective and proper operation of the Interstate Identification Index system for noncriminal justice purposes.

Matters for discussion are expected to include:

(1) Proposed Changes to the Compact Council's Frequently Asked Questions Guide
(2) Modernization of the *CJIS Security Policy*
(3) Review of the National Fingerprint File Program Participation Implementation Plans

The meeting will be conducted with a blended participation option. The meeting will be open to the public on a first-come, first-serve basis with limited seating due to COVID–19 safety protocols. Virtual options are available. Individuals must provide their name, city, state, phone, and email address to register. Information regarding virtual access will be provided prior to the meeting to all registered individuals.

Any member of the public wishing to file a written statement with the Council or wishing to address this session of the Council should notify the FBI Compact Officer, Mrs. Chasity S. Anderson at *compactoffice@fbi.gov,* at least 7 days prior to the start of the session. The notification should contain the individual's name and corporate designation, consumer affiliation, or government designation, along with a short statement describing the topic to be addressed and the time needed for the presentation. Individuals will ordinarily be allowed up to 15 minutes

[1] Chair Kearns would affirm the ID's finding that the economic prong was not established with respect to AutoStore USA's investments.

to present a topic. The Compact Officer will compile all requests and submit to the Compact Council leadership for consideration.

Individuals requiring special accommodations should contact Ms. Anderson at *compactoffice@fbi.gov* by no later than April 28, 2022. Please note all personal registration information may be made publicly available through a Freedom of Information Act request.

Chasity S. Anderson,

FBI Compact Officer, Criminal Justice Information Services Division, Federal Bureau of Investigation.

[FR Doc. 2022–05528 Filed 3–15–22; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Voluntary Fiduciary Correction Program

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before April 15, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This information collection arises from two related actions: The Voluntary Fiduciary Correction Program (the VFC Program or the Program) and Prohibited Transaction Class Exemption (PTE) 2002–51 (the VFC Exemption or the Exemption). The Department adopted the Program and the Exemption in order to encourage members of the public to voluntarily correct transactions that violate (or are suspected of violating) the fiduciary or prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA). The information collection provisions of the Program and the Exemption include third-party disclosures, recordkeeping, and disclosures to the Federal government. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 9, 2021 (86 FR 62208).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–EBSA.

Title of Collection: Voluntary Fiduciary Correction Program.

OMB Control Number: 1210–0118.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 3,325.

Total Estimated Number of Responses: 246,918.

Total Estimated Annual Time Burden: 22,202 hours.

Total Estimated Annual Other Costs Burden: $42,175.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: March 10, 2022.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2022–05491 Filed 3–15–22; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Abandoned Individual Account Plan Termination

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before April 15, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Employee Benefits Security Administration (EBSA) has promulgated

three regulations and a prohibited transaction class exemption that address the problem of abandoned individual account pension plans. This collection contains disclosure, recordkeeping, and reporting requirements associated with EBSA's abandoned plan program, which allows plan custodians to wind up plans that have been abandoned due to significant business events, such as bankruptcies, mergers, acquisitions, and other similar transactions affecting the status of an employer. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 9, 2021 (86 FR 62208).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–EBSA.

Title of Collection: Abandoned Individual Account Plan Termination.

OMB Control Number: 1210–0127.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 25,920.

Total Estimated Number of Responses: 1,134,752.

Total Estimated Annual Time Burden: 47,902 hours.

Total Estimated Annual Other Costs Burden: $58,989.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: March 10, 2022.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2022–05492 Filed 3–15–22; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Consumer Price Index Housing Survey

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before April 15, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Consumer Price Index (CPI) is the timeliest instrument compiled by the U.S. Government that is designed to measure changes in the purchasing power of the urban consumer's dollar. This ICR contains the collection of price data from rental units, which is essential for the timely and accurate calculation of the shelter component of the CPI. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 27, 2021 (86 FR 59427).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–BLS.

Title of Collection: Consumer Price Index Housing Survey.

OMB Control Number: 1220–0163.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 70,465.

Total Estimated Number of Responses: 123,342.

Total Estimated Annual Time Burden: 12,037 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: March 10, 2022.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2022–05493 Filed 3–15–22; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2021–022]

Privacy Act of 1974; System of Records

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice revising a system of records.

SUMMARY: We propose to revise a system of records in our existing inventory of systems subject to the Privacy Act of 1974. The system is NARA 1, Researcher Application Files. We are adding a new purpose/routine use to notify researchers who use our facilities if they might have been exposed to COVID–19 while at our facility, to allow

for similar notifications in the event of future public health emergencies, and to allow notification of health departments for collaborative efforts to address exposure and meet reporting requirements. We are also updating the SORN to reorganize the SORN into the current required format. In this notice, we publish the system of records notice in full for public notice and comment.

DATES: Submit comments on this system of records by April 15, 2022. This revised systems of records, NARA 1, is effective on April 25, 2022 unless we receive comments that necessitate revising the SORN.

ADDRESSES: You may submit comments, identified by ''SORN NARA 1'' by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- Due to COVID–19 restrictions, we do not have staff at the building to receive mail, so we are temporarily suspending the mailing option. If you are not able to submit comments using the eRulemaking portal and need to make other arrangements, please email us at *regulation_comments@nara.gov* and we will work with you on an alternative.

Instructions: All submissions must include SORN NARA 1 so we can identify what the comment is responding to. We may publish any comments we receive without changes, including any personal information you include.

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, Regulatory and External Policy Program Manager, by email at *regulation_comments@nara.gov* or by phone at 301.837.3151.

SUPPLEMENTARY INFORMATION: Our Researcher Application Files system of records (NARA 1) includes personal and contact information we collect from members of the public who use our facilities for research purposes. Due to the COVID–19 pandemic and requests to report and track cases of confirmed coronavirus infection, we are revising this system of records in order to add a new purpose/routine use. In addition to other purposes previously identified, we will use the researcher contact information to contact the researcher if they were in one of our research facilities on a given day and we later receive notice of a confirmed case of the coronavirus in another person who was also in the facility that day, to notify researchers of other local or facility-specific health information as appropriate, and to provide researchers with updates related to researcher services.

We do not provide personal or health information about another person in these notifications. In the case of COVID–19 notifications, we just notify visitors that there was a confirmed case in that facility on the same day they were there, so that the recipient can take appropriate actions to determine whether they have been infected as well, identify where and when, minimize exposure to others, and receive treatment as needed. In anticipation of possible future needs for similar notifications in other crisis situations, we have written the new purpose to not be COVID–19-specific and to allow additional kinds of researcher services updates, and we have also added a new routine use for reporting exposures to health departments and officials as required, as well as to facilitate efforts to address exposure.

The Privacy Act of 1974, as amended (5 U.S.C. 552a) (''Privacy Act''), provides certain safeguards for an individual against an invasion of personal privacy. It requires Federal agencies that disseminate any record of personally identifiable information to do so in a manner that assures the action is for a necessary and lawful purpose, the information is current and accurate for its intended use, and the agency provides adequate safeguards to prevent misuse of such information. NARA intends to follow these principles when transferring information to another agency or individual as a ''routine use,'' including assuring that the information is relevant for the purposes for which it is transferred.

David S. Ferriero,

Archivist of the United States.

NARA 1

SYSTEM NAME AND NUMBER:

Researcher Application Files, NARA 1.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The following locations maintain researcher application files:

(1) Individual Presidential libraries, and

(2) Office of Research Services.

The system address is the same as the system manager address.

SYSTEM MANAGER(S):

The system managers for researcher application files are:

(1) For researchers who apply to use records or archival materials in a Presidential library: The director of the individual Presidential library; and

(2) For researchers who apply to use records or archival materials in any other facility: Executive for Research Services.

The business addresses for these system managers are listed in Appendix B, last republished September 27, 2018 (83 FR 48869). As system manager contact information is subject to change, for the most up-to-date information visit our website at *www.archives.gov/privacy/inventory.*

AUTHORITY FOR MAINTAINING THE SYSTEM:

44 U.S.C. 2108, 2111 note, and 2203(g)(1).

PURPOSE(S) OF THE SYSTEM:

NARA uses the information in this system to register researchers who wish to access archival materials; to maintain physical and intellectual control over archival holdings and to refer related information to the Office of Inspector General if we determine that archival materials are missing or mutilated; to disseminate information related to events and programs of interest to NARA's researchers, as appropriate; to enable contact tracing related to a public health emergency, such as a pandemic or epidemic, and to report exposures to public health departments, as required; and to measure customer satisfaction with NARA services. We may use aggregate information from this system to review, analyze, plan, and formulate policy related to customer service staffing and facility needs.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system include people who apply to use archival materials for research in NARA facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Researcher application files may include: Researcher applications; related correspondence; and electronic records. These files may contain the following information about an individual: Name; address; telephone number; proposed research topic(s); occupation; name, email address, and mailing address of employer/institutional affiliation; educational level and major field of study; expected result(s) of research; photo; researcher card number; type of records used; and other information furnished by the individual. Electronic systems may also contain additional information related to the application process.

RECORD SOURCE CATEGORIES:

NARA obtains information in researcher application files from researchers and from NARA employees who maintain the files.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

We disclose, pursuant to the following routine uses, researcher application files to:

(a) Provide relevant information to Federal agencies such as the Department of Health and Human Services (HHS), state and local health departments, and other public health or cooperating medical authorities, to more effectively respond to exposures to communicable diseases, and to satisfy mandatory reporting requirements when applicable; and

(b) routine uses A, C, E, F, G, H, and I, described in Appendix A. Appendix A was last republished on December 20, 2013 (78 FR 77255, 77287). For the most up-to-date information, see the Appendix on our website at *www.archives.gov/privacy/inventory.*

POLICIES AND PRACTICES FOR STORING RECORDS:

Paper and electronic records.

POLICIES AND PRACTICES FOR RETRIEVING RECORDS:

Staff may retrieve information in the records by the individual's name, researcher card number, or any of the other fields in the researcher registration database.

POLICIES AND PRACTICES FOR RETAINING AND DISPOSING OF RECORDS:

Researcher application files are temporary records and we destroy them in accordance with disposition instructions in the NARA Records Schedule (a supplement to the NARA Files Maintenance and Records Disposition Manual). Individuals may request a copy of the disposition instructions from the NARA Privacy Act Officer (at the address listed in Appendix B).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

During normal hours of operation, we maintain paper records in areas accessible only by authorized NARA personnel. Authorized NARA personnel access electronic records via password-protected workstations located in attended offices or through a secure remote-access network. After business hours, buildings have security guards and secured doors, and electronic surveillance equipment monitors all entrances.

RECORD ACCESS PROCEDURES:

People who wish to access their records should submit a request in writing to the NARA Privacy Act Officer at the address listed in Appendix B.

CONTESTING RECORDS PROCEDURES:

NARA's rules for contesting the contents of a person's records and appealing initial determinations are in 36 CFR part 1202.

NOTIFICATION PROCEDURES:

People inquiring about their records should notify the NARA Privacy Act Officer at the address listed in Appendix B.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Last republished as a full notice on December 20, 2013 (78 FR 77255).

[FR Doc. 2022–05503 Filed 3–15–22; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Geosciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

NAME AND COMMITTEE CODE: Advisory Committee for Geosciences (1755).

DATE AND TIME:

April 13, 2022; 11:00 a.m.–4:30 p.m. EDT

April 14, 2022; 11:00 a.m.–4:30 p.m. EDT

PLACE: Virtual. Meeting registration information is available on the GEO Advisory Committee website at *https://www.nsf.gov/geo/advisory.jsp).*

TYPE OF MEETING: Open.

CONTACT PERSON: Melissa Lane, National Science Foundation, Room C 8000, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; Phone 703–292–8500.

MINUTES: May be obtained from the contact person listed above.

PURPOSE OF MEETING: To provide advice, recommendations, and oversight on support for geoscience research and education including atmospheric, geo-space, earth, ocean, and polar sciences.

Agenda

April 13, 2022

- Directorate and NSF activities and plans
- Update on Division and OPP Activities
- Discussion on Growing and Enhancing Access to Research Resources for all Institutions
- Discussion of Innovation and Partnerships

April 14, 2022

- Discussion of the NSF Learning Agenda Related to Climate Equity
- Meeting with the NSF Director and Chief Operating Officer
- Action Items/Planning for Fall 2022 Meeting

Dated: March 11, 2022.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2022–05540 Filed 3–15–22; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

[Docket No.: NTSB–2021–0009]

Office of the Managing Director: Strategic Management Program Fiscal Year (FY) 2022–2026 Strategic Plan

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Notice; issuance of final publication.

SUMMARY: The NTSB announces the availability of the following publication: ''NTSB FY 2022–2026 Strategic Plan''.

DATES: The plan was published on February 23, 2022.

ADDRESSES: This document may be obtained at the following link: *https://www.ntsb.gov/about/reports/Documents/FY-22-26-Strategic-Plansig.pdf.*

FOR FURTHER INFORMATION CONTACT: John DeLisi, Senior Advisor for Policy and Strategic Initiatives, (202) 314–6000, *strategicplan@ntsb.gov.*

SUPPLEMENTARY INFORMATION: On November 24, 2021, the NTSB published a notice request for comments in the **Federal Register** [86 FR 67092]. The purpose of this review was to seek external input via public comments and invited stakeholder reviews to shape priorities toward developing a new 5-year strategic plan. All comments received were reviewed and considered in finalizing the current document. Comments for Docket No. NTSB–2021–0009 can be found at: *https://*

www.regulations.gov/docket/NTSB-2021-0009.

Jennifer Homendy,

Chair.

[FR Doc. 2022–05513 Filed 3–15–22; 8:45 am]

BILLING CODE 7533–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94396; File No. SR–CboeBZX–2021–052]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the Global X Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

March 10, 2022.

I. Introduction

On August 3, 2021, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Global X Bitcoin Trust (''Trust'') under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on August 23, 2021.[3]

On September 29, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On November 18, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change.[7] On February 9, 2022, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that BZX has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and in particular, the requirement that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [9]

When considering whether BZX's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard used in its orders considering previous proposals to list bitcoin [10]-based commodity trusts and bitcoin-based trust issued receipts.[11] As the Commission has explained, an exchange that lists bitcoin-based exchange-traded products (''ETPs'') can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[12]

The standard requires such surveillance-sharing agreements since they ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' [13] The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading the underlying assets for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[14] The hallmarks of a surveillance-sharing agreement are that the agreement

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92689 (Aug. 17, 2021), 86 FR 47176 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboebzx-2021-052/srcboebzx2021052.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 93174, 86 FR 55043 (Oct. 5, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 93608, 86 FR 67094 (Nov. 24, 2021).

[8] *See* Securities Exchange Act Release No. 94202, 87 FR 8628 (Feb. 15, 2022).

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 86 FR 47177.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order''); Order Disapproving a Proposed Rule Change to List and Trade Shares of the Valkyrie Bitcoin Fund under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR–NYSEArca–2021–31) (''Valkyrie Order''); Order Disapproving a Proposed Rule Change to List and Trade Shares of the Kryptoin Bitcoin ETF Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR–CboeBZX–2021–029) (''Kryptoin Order''); Order Disapproving a Proposed Rule Change to List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 94006 (Jan. 20, 2022), 87 FR 3869 (Jan. 25, 2022) (SR–NYSEArca–2021–37) (''SkyBridge Order''); and Order Disapproving a Proposed Rule Change to List and Trade Shares of the Wise Origin Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94080 (Jan. 27, 2022), 87 FR 5527 (Feb. 1, 2022) (SR–CboeBZX–2021–039) (''Wise Origin Order''). *See also* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca–2016–101) (''SolidX Order''). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019) (''VanEck Order'').

[12] *See* USBT Order, 85 FR 12596. *See also* Winklevoss Order, 83 FR 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs); GraniteShares Order, 83 FR 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

[13] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998) (''NDSP Adopting Release''). *See also* Winklevoss Order, 83 FR 37594; ProShares Order, 83 FR 43936; GraniteShares Order, 83 FR 43924; USBT Order, 85 FR 12596.

[14] *See* NDSP Adopting Release, 63 FR 70959.

provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[15]

In the context of this standard, the terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[16] A surveillance-sharing agreement must be entered into with a ''significant market'' to assist in detecting and deterring manipulation of the ETP, because a person attempting to manipulate the ETP is reasonably likely to also engage in trading activity on that ''significant market.'' [17]

Consistent with this standard, for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (''ISG'') membership in common with, that market.[18] Moreover, the surveillance-sharing agreements have been consistently present whenever the Commission has approved the listing and trading of derivative securities, even where the underlying securities were also listed on national securities exchanges—such as options based on an index of stocks traded on a national securities exchange—and were thus subject to the Commission's direct regulatory authority.[19]

Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation.[20] In response, the Commission has agreed that, if a listing exchange could establish that the underlying market inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets, it would not necessarily need to enter into a surveillance-sharing agreement with a regulated significant market.[21] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.[22] No listing exchange has satisfied its burden to make such demonstration.[23]

Here, BZX contends that approval of the proposal is consistent with Section 6(b)(5) of the Exchange Act, in particular Section 6(b)(5)'s requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.[24] As discussed in more detail below, BZX asserts that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the Exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size,[25] and there exist other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[26]

Although BZX recognizes the Commission's focus on potential manipulation of bitcoin ETPs in prior disapproval orders, BZX argues that such manipulation concerns have been sufficiently mitigated, and that the growing and quantifiable investor protection concerns should be the central consideration of the Commission.[27] Specifically, as discussed in more detail below, the Exchange asserts that the significant increase in trading volume in bitcoin futures on the Chicago Mercantile Exchange (''CME''), the growth of liquidity in the spot market for bitcoin, and certain features of the Shares mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter (''OTC'') bitcoin funds, including premium/discount volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.[28]

Further, BZX believes that the proposal would give U.S. investors access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors. According to BZX, the proposed listing and trading of the Shares would mitigate risk by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are

[15] *See* Winklevoss Order, 83 FR 37592–93; Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm.*

[16] *See* Winklevoss Order, 83 FR 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants. *See id.*

[17] *See* USBT Order, 85 FR 12597.

[18] *See* Winklevoss Order, 83 FR 37594.

[19] *See* USBT Order, 85 FR 12597; Securities Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR–Amex–93–28) (order approving listing of options on American Depository Receipts (''ADRs'')). The Commission has also required a surveillance-sharing agreement in the context of index options even when (i) all of the underlying index component stocks were either registered with the Commission or exempt from registration under the Exchange Act; (ii) all of the underlying index component stocks traded in the U.S. either directly or as ADRs on a national securities exchange; and (iii) effective international ADR arbitrage alleviated concerns over the relatively smaller ADR trading volume, helped to ensure that ADR prices reflected the pricing on the home market, and helped to ensure more reliable price determinations for settlement purposes, due to the unique composition of the index and reliance on ADR prices. *See* Securities Exchange Act Release No. 26653 (Mar. 21, 1989), 54 FR 12705, 12708 (Mar. 28, 1989) (SR–Amex–87–25) (stating that ''surveillance-sharing agreements between the exchange on which the index option trades and the markets that trade the underlying securities are necessary'' and that ''[t]he exchange of surveillance data by the exchange trading a stock index option and the markets for the securities comprising the index is important to the detection and deterrence of intermarket manipulation.''). And the Commission has required a surveillance-sharing agreement even when approving options based on an index of stocks traded on a national securities exchange. *See* Securities Exchange Act Release No. 30830 (June 18, 1992), 57 FR 28221, 28224 (June 24, 1992) (SR–Amex–91–22) (stating that surveillance-sharing agreements ''ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses'').

[20] *See* USBT Order, 85 FR 12597.

[21] *See* Winklevoss Order, 83 FR 37580, 37582–91 (addressing assertions that ''bitcoin and bitcoin [spot] markets'' generally, as well as one bitcoin trading platform specifically, have unique resistance to fraud and manipulation); *see also* USBT Order, 85 FR 12597.

[22] *See* USBT Order, 85 FR 12597.

[23] *See supra* note 11.

[24] *See* Notice, 86 FR 47183.

[25] *See id.* at 47183–84.

[26] *See id.* at 47184.

[27] *See id.* at 47179.

[28] *See id.* at 47183.

imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.[29]

In the analysis that follows, the Commission examines whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act by addressing: In Section III.B.1 assertions that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices; in Section III.B.2 assertions that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin; and in Section III.C assertions that the proposal is consistent with the protection of investors and the public interest.

Based on its analysis, the Commission concludes that BZX has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Commission further concludes that BZX has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin. As discussed further below, BZX repeats various assertions made in prior bitcoin-based ETP proposals that the Commission has previously addressed and rejected—and more importantly, BZX does not respond to the Commission's reasons for rejecting those assertions but merely repeats them. As a result, the Commission is unable to find that the proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).

The Commission again emphasizes that its disapproval of this proposed rule change does not rest on an evaluation of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. Rather, the Commission is disapproving this proposed rule change because, as discussed below, BZX has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5).

II. Description of the Proposed Rule Change

As described in more detail in the Notice,[30] the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust is to reflect the performance of the price of bitcoin less the expenses of the Trust's operations. The Trust would not be actively managed and would not seek to reflect the performance of any benchmark or index.[31] Each Share would represent a fractional undivided beneficial interest in the bitcoin held by the Trust. The Trust's assets would consist of bitcoin held by the custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents; however, there may be situations where the Trust will hold cash on a temporary basis.[32] In seeking to achieve its investment objective, the Trust would hold bitcoin and value its assets daily in accordance with Generally Accepted Accounting Principles (''GAAP''), which generally value bitcoin by reference to orderly transactions in the principal active market for bitcoin.[33]

The net asset value (''NAV'') for the Trust would be calculated by the administrator once a day and would be disseminated daily to all market participants at the same time.[34] The Sponsor would use fair value standards according to GAAP to value the assets and liabilities of the Trust. According to the Exchange, the fair value of an asset that is traded on a market would be generally measured by reference to the orderly transactions on an active market. Among all active markets with orderly transactions, the market that is used to determine the fair value of an asset is the principal market (with exceptions), which is either the market on which the Trust actually transacts or, if there is sufficient evidence, the market with the most trading volume and level of activity for the asset.[35] Where there is no active market with orderly transactions for an asset, the Sponsor's valuation committee would follow policies and procedures to determine the fair value.[36]

The Trust will provide information regarding the Trust's bitcoin holdings, as well as an Intraday Indicative Value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.[37]

When the Trust sells or redeems its Shares, it will do so in ''in-kind'' transactions in blocks of Shares (in an amount to be determined). When creating the Shares, authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust's account with the custodian in exchange for Shares, and when redeeming the Shares, the Trust, through the custodian, will deliver bitcoin to such authorized participants.[38]

III. Discussion

A. The Applicable Standard for Review

The Commission must consider whether BZX's proposal is consistent with the Exchange Act. Section 6(b)(5) of the Exchange Act requires, in relevant part, that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [39]

[29] *See id.* at 47179.

[30] *See* Notice, *supra* note 3. *See also* Registration Statement on Form S–1, dated July 21, 2021, submitted to the Commission by Global X Digital Assets, LLC (''Sponsor'') on behalf of the Trust (''Registration Statement'').

[31] *See* Notice, 86 FR 47184–85. Delaware Trust Company is the trustee. The Sponsor will select the administrator, transfer agent, and marketing agent in connection with the creation and redemption of the Shares, and a third-party regulated custodian that will be responsible for custody of the Trust's bitcoin. *See id.* at 47184.

[32] *See id.* at 47184.

[33] *See id.* at 47185.

[34] *See id.* at 47186.

[35] The Sponsor would first determine which markets are likely to be active markets with orderly transactions for bitcoin. Currently, the Sponsor has determined that such markets are those that provide relevant and reliable price and volume information because the venues that support such markets: (1) Conduct trading for bitcoin in U.S. dollars; (2) are appropriately licensed to engage in bitcoin trading involving New York-based customers; and (3) otherwise have sufficient indicia of an active market with orderly transactions. Next, among the venues supporting active markets with orderly transactions, the Sponsor would determine to which such venues the Trust has access, and refer to these as eligible venues. Eligible venues consist of eligible OTC venues and eligible exchanges. The Sponsor would then determine the principal market for bitcoin as either the market that the Trust normally transacts in for bitcoin, or, if the Trust does not normally transact in any market or the Sponsor has sufficient evidence that a particular market has the highest trading volume and level of activity, such market. The Trust will not purchase or, barring the liquidation of the Trust or the Trust incurring certain extraordinary expenses or liabilities not contractually assumed by the Sponsor, sell bitcoin directly. As a result, the Sponsor expects that the principal market will generally be the market with the highest trading volume and level of activity, which the Sponsor expects will typically be an eligible exchange. The Sponsor would determine the principal market for bitcoin at least quarterly and more frequently as circumstances warrant. *See id.* at 47185.

[36] *See id.*

[37] *See id.* at 47185–86.

[38] *See id.* at 47184.

[39] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [40]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[41] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[42] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[43]

B. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Prevent Fraudulent and Manipulative Acts and Practices

(1) Assertions That Other Means Besides Surveillance-Sharing Agreements Will Be Sufficient To Prevent Fraudulent and Manipulative Acts and Practices

As stated above, the Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with a comprehensive surveillance-sharing agreement with a regulated market of significant size, including by demonstrating that the bitcoin market as a whole or the relevant underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation.[44] Such resistance to fraud and manipulation must be novel and beyond those protections that exist in traditional commodities or securities markets.[45]

BZX asserts that bitcoin is resistant to price manipulation. According to BZX, the geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin.[46] Fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging.[47] To the extent that there are bitcoin platforms engaged in, or allowing, wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with quotes that they deem non-executable.[48] BZX further argues that the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin on any single venue would require manipulation of the global bitcoin price in order to be effective.[49] Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin trading venue.[50] As a result, BZX concludes that ''the potential for manipulation on a [bitcoin] trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.'' [51]

As with the previous proposals, the Commission here concludes that the record does not support a finding that the bitcoin market is inherently and uniquely resistant to fraud and manipulation. BZX asserts that, because of how bitcoin trades occur, including through continuous means and through fragmented platforms, arbitrage across the bitcoin platforms essentially helps to keep global bitcoin prices aligned with one another, thus hindering manipulation. The Exchange, however, does not provide any data or analysis to support its assertions, either in terms of how closely bitcoin prices are aligned across different bitcoin trading venues or how quickly price disparities may be arbitraged away.[52] As stated above, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[53]

Efficient price arbitrage, moreover, is not sufficient to support the finding that a market is uniquely and inherently resistant to manipulation such that the Commission can dispense with surveillance-sharing agreements.[54] The Commission has stated, for example, that even for equity options based on securities listed on national securities exchanges, the Commission relies on surveillance-sharing agreements to detect and deter fraud and manipulation.[55] Here, the Exchange provides no evidence to support its assertion of efficient price arbitrage across bitcoin platforms, let alone any evidence that price arbitrage in the bitcoin market is novel or unique so as to warrant the Commission dispensing with the requirement of a surveillance-sharing agreement. Moreover, BZX does not take into account that a market participant with a dominant ownership position would not find it prohibitively expensive to overcome the liquidity supplied by arbitrageurs and could use

national securities exchange unless the Commission determines that ''[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78f(b)(5).

[40] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[41] *See id.*

[42] *See id.*

[43] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 447 (D.C. Cir. 2017) (''Susquehanna'').

[44] *See* USBT Order, 85 FR 12597 n.23. The Commission is not applying a ''cannot be manipulated'' standard. Instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *See id.*

[45] *See id.* at 12597.

[46] *See* Notice, 86 FR 47183 n.54.

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] Indeed, the Registration Statement states that ''[b]itcoin faces significant scaling obstacles that can lead to high fees or slow settlement times, and attempts to increase the volume of transactions may not be effective.'' *See* Registration Statement at 14. BZX does not, however, provide data or analysis to address, among other things, whether such risks of increased fees and bitcoin transaction settlement times may affect the arbitrage effectiveness that BZX asserts. *See also infra* note 67 and accompanying text (referencing statements made in the Registration Statement that contradict assertions made by BZX).

[53] *See supra* note 43.

[54] *See* Winklevoss Order, 83 FR 37586; SolidX Order, 82 FR 16256–57; USBT Order, 85 FR 12601; WisdomTree Order, 86 FR 69325; Valkyrie Order, 86 FR 74159–60; Kryptoin Order, 86 FR 74170; Wise Origin Order, 87 FR 5531.

[55] *See, e.g.,* USBT Order, 85 FR 12601; WisdomTree Order, 86 FR 69329; Valkyrie Order, 86 FR 74160; Kryptoin Order, 86 FR 74170; Wise Origin Order, 87 FR 5531.

dominant market share to engage in manipulation.[56]

In addition, the Exchange makes the unsupported claim that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin do not influence the ''real'' price of bitcoin. The Exchange also asserts that, to the extent that there are bitcoin platforms engaged in or allowing wash trading or other manipulative activities, market participants will generally ignore those platforms.[57] However, without the necessary data or other evidence, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation.[58]

Additionally, the continuous nature of bitcoin trading does not eliminate manipulation risk, and neither do linkages among markets, as BZX asserts.[59] Even in the presence of continuous trading or linkages among markets, formal (such as those with consolidated quotations or routing requirements) or otherwise (such as in the context of the fragmented, global bitcoin markets), manipulation of asset prices, as a general matter, can occur simply through trading activity that creates a false impression of supply or demand.[60]

BZX also argues that the significant liquidity in the bitcoin spot market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year.[61] According to BZX, in January 2020, for example, the cost to buy or sell $5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in February 2021) with a market impact of 50 basis points (compared to 30 basis points in February 2021). For a $10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in February 2021) with a market impact of 80 basis points (compared to 50 basis points in February 2021). BZX contends that as the liquidity in the bitcoin spot market increases, it follows that the impact of $5 million and $10 million orders will continue to decrease.[62]

However, the data furnished by BZX regarding the cost to move the price of bitcoin, and the market impact of such attempts, are incomplete. BZX does not provide meaningful analysis pertaining to how these figures compare to other markets or why one must conclude, based on the numbers provided, that the bitcoin market is costly to manipulate. Further, BZX's analysis of the market impact of a mere two sample transactions is not sufficient evidence to conclude that the bitcoin market is resistant to manipulation.[63] Even assuming that the Commission agreed with BZX's premise, that it is costly to manipulate the bitcoin market and it is becoming increasingly so, any such evidence speaks only to establish that there is some resistance to manipulation, not that it establishes *unique* resistance to manipulation to warrant dispensing with the standard surveillance-sharing agreement.[64] The Commission thus concludes that the record does not demonstrate that the nature of bitcoin trading renders the bitcoin market inherently and uniquely resistant to fraud and manipulation.

Moreover, BZX does not sufficiently contest the presence of possible sources of fraud and manipulation in the bitcoin spot market generally that the Commission has raised in previous orders, which have included (1) ''wash'' trading,[65] (2) persons with a dominant position in bitcoin manipulating bitcoin pricing, (3) hacking of the bitcoin network and trading platforms, (4) malicious control of the bitcoin network, (5) trading based on material, non-public information, including the dissemination of false and misleading information, (6) manipulative activity involving the purported ''stablecoin'' Tether (''USDT''), and (7) fraud and manipulation at bitcoin trading platforms.[66]

In addition, BZX does not address risk factors specific to the bitcoin blockchain and bitcoin platforms, described in the Trust's Registration Statement, that undermine the argument that the bitcoin market is inherently resistant to fraud and manipulation. For example, the Registration Statement acknowledges that ''[t]he venues through which bitcoin trades are relatively new and may be more exposed to operational problems or failure''; that ''[o]ver the past several years, a number of bitcoin exchangs have been closed due to fraud, failure or security breaches''; that ''[s]ecurity breaches, computer malware, ransomware and computer hacking attacks have been a prevalent concern in relation to digital assets''; that ''the Trust's bitcoin held in the Trust's account with the [custodian] will be an appealing target to hackers or malware distributors seeking to destroy, damage or steal the Trust's bitcoin and will only become more appealing as the Trust's assets grow''; that the bitcoin blockchain could be vulnerable: To exploitation of flaws in the bitcoin source code, to a ''51% attack,'' in which a malicious actor or actors that control a majority of the processing power on the bitcoin network would be able to gain full control of the network and the ability to alter the blockchain, to ''cancer nodes,'' through which a malicious actor can disconnect users from the bitcoin network, and to ''double-spend'' attacks; that it is ''reasonably likely'' that a ''small group of early bitcoin adopters hold a signficiant proportion of the bitcoin that has been created to date,'' there are ''no regulations in place that would prevent a large holder from selling the bitcoin it holds,'' and such large holders could engage in ''large-scale sales'' that would affect the ''price of bitcoin''; and that ''[t]he trading for spot bitcoin occurs on multiple trading venues that have various levels and types of regulation, but are not regulated in the same manner as traditional stock and bond exchanges,'' and if these spot markets ''do not operate smoothly or face technical, security or regulatory issues, that could impact the ability of Authorized Participants to make markets in the Shares'' which could

[56] *See, e.g.,* Winklevoss Order, 83 FR 37584; USBT Order, 85 FR 12600–01; WisdomTree Order, 86 FR 69325; Valkyrie Order, 86 FR 74160; Kryptoin Order, 86 FR 74170; SkyBridge Order, 87 FR 3783–84; Wise Origin Order, 87 FR 5531. *See also* Registration Statement at 29 (stating that ''[i]t is possible, and in fact, reasonably likely, that a small group of early bitcoin adopters hold a significant proportion of the bitcoin that has been created to date. There are no regulations in place that would prevent a large holder of bitcoin from selling bitcoin it holds. To the extent such large holders of bitcoin engage in large-scale sales or distributions . . . it could result in a reduction in the price of bitcoin and adversely affect an investment in the Shares.'').

[57] *See* Notice, 86 FR 47183 n.54.

[58] *See* USBT Order, 85 FR 12601. *See also* WisdomTree Order, 86 FR 69325; Kryptoin Order, 86 FR 74170; Wise Origin Order, 87 FR 5531.

[59] *See* Winklevoss Order, 83 FR 37585 n.92 and accompanying text. *See also* WisdomTree Order, 86 FR 69325–26; Kryptoin Order, 86 FR 74170; SkyBridge Order, 87 FR 3783–84; Wise Origin Order, 87 FR 5531.

[60] *See* Winklevoss Order, 83 FR 37585.

[61] *See* Notice, 86 FR 47184.

[62] *See id.*

[63] Aside from stating that the ''statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021,'' the Exchange provides no other information pertaining to the methodology used to enable the Commission to evaluate these findings or their significance. *See id.* at 47184 nn.59–60.

[64] *See* USBT Order, 85 FR 12601. *See also* Kryptoin Order, 86 FR 74171.

[65] *See supra* notes 57–58 and accompanying text.

[66] *See* USBT Order, 85 FR 12600–01 & nn.66–67 (discussing J. Griffin & A. Shams, *Is Bitcoin Really Untethered?* (October 28, 2019), *available at https://ssrn.com/abstract=3195066* and published in 75 J. Finance 1913 (2020)); Winklevoss Order, 83 FR 37585–86; Valkyrie Order, 86 FR 74160; SkyBridge Order, 87 FR 3872.

lead to ''trading in the Shares [to] occur at a material premium or discount against the NAV.'' [67]

BZX also asserts that other means to prevent fraud and manipulation are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange mentions that the methodology that it uses to value the Trust's bitcoin [68] is itself resistant to manipulation.[69] Simultaneously, the Exchange also states that, because the Trust will engage in in-kind creations and redemptions only, ''the valuation methodology [is] significantly less important.'' [70] The Exchange elaborates further that, ''because the Trust will not accept cash to buy bitcoin in order to create new shares, will charge fees as a percentage of the Trust's bitcoin holdings measure[d] in bitcoin and not in dollars, and . . . will not be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'' [71] According to BZX, when authorized participants create Shares with the Trust, they would need to deliver a certain number of bitcoin per share (regardless of the valuation used), and when they redeem with the Trust, they would similarly expect to receive a certain number of bitcoin per share.[72] As such, BZX argues that, even if the price used to value the Trust's bitcoin is manipulated, the ratio of bitcoin per Share does not change, and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value.[73] This, according to BZX, not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the valuation methodology because there is little financial incentive to do so.[74]

Based on assertions made and the information provided, the Commission can find no basis to conclude that BZX has articulated other means to prevent fraud and manipulation that are sufficient to justify dispensing with the requisite surveillance-sharing agreement. First, the record does not demonstrate that the proposed valuation methodology would make the proposed ETP resistant to fraud or manipulation such that a surveillance-sharing agreement with a regulated market of significant size is unnecessary. The Exchange states that both ''certain'' bitcoin venues and ''the OTC market'' have met the Sponsor's criteria to be considered ''active markets with orderly transactions for bitcoin'' and thus to potentially be deemed the ''principal market'' whose prices the Sponsor will, generally, use to value its bitcoin.[75] However, the Exchange does not identify which bitcoin venues, or what portions of ''the OTC market,'' meet its criteria, nor does the Exchange assess the possible influence that spot platforms that do not meet the Sponsor's criteria would have on the ''principal market'' that is ultimately used for valuation.[76] In addition, as discussed above, the record does not establish that the broader bitcoin market is inherently and uniquely resistant to fraud and manipulation. Accordingly, to the extent that trading on platforms not directly used to value the Trust's bitcoin affects prices on the market(s) that the Sponsor does use for such valuation, the characteristics of those other platforms—where various kinds of fraud and manipulation from a variety of sources may be present and persist—may affect whether the valuation methodology is resistant to manipulation.

Moreover, the Exchange's assertions that the valuation methodology is resistant to manipulation are contradicted by the Registration Statement's own statements. Specifically, the Registration Statement states that ''[o]ver the past several years, a number of bitcoin exchanges have been closed due to fraud, failure or security breaches.'' [77] And both the Registration Statement and the Exchange acknowledge that: ''[W]hether the principal market for bitcoin is an eligible exchange or the OTC market, the price on such principal market may not always represent fair value or the transactions on such market may not always represent orderly transactions.'' [78] As such, the valuation methodology allows for ''subjective determinations'' by the Sponsor's valuation committee [79] ''based on consideration of any information or factors the Sponsor's valuation committee deems appropriate.'' [80] Although the Sponsor raises concerns regarding fraud and security of bitcoin platforms in the Registration Statement, leading to the potential need for ''subjective'' fair value determinations, the Exchange does not explain how or why such concerns are consistent with its assertion that the valuation methodology is resistant to fraud and manipulation.

In addition, among the criteria that the Sponsor would use to identify ''active markets with orderly transactions'' is whether a venue is ''appropriately licensed to engage in bitcoin trading involving New York-based customers (and therefore, among other things, have programs to effectively detect, prevent, and respond to fraud).'' [81] However, even assuming that this means that the venue would be regulated by the New York State Department of Financial Services (''NYSDFS''), the level of oversight of bitcoin spot platforms is not equivalent to the obligations, authority, and oversight of national securities exchanges or futures exchanges and therefore is not an appropriate substitute.[82] National securities exchanges are required to have rules that are ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [83] Moreover, national securities exchanges must file proposed rules with the Commission regarding certain material aspects of their operations,[84] and the Commission has the authority to disapprove any such rule that is not consistent with the requirements of the Exchange Act.[85]

[67] *See* Registration Statement at 21, 27, 29, 34, 44–45. *See also* Winklevoss Order, 83 FR 37585.

[68] *See supra* notes 34–36 and accompanying text.

[69] *See* Notice, 86 FR 47184.

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See id.* at 47185.

[76] As discussed above, while the Exchange asserts that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin do not influence the ''real'' price of bitcoin, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation. *See supra* notes 57–58 and accompanying text.

[77] *See* Registration Statement at 27.

[78] *See* Registration Statement at 48; Notice, 86 FR 47185.

[79] *See* Registration Statement at 49.

[80] *See* Registration Statement at 48; Notice, 86 FR 47185.

[81] *See* Notice, 86 FR 47185.

[82] *See also* USBT Order, 85 FR 12603–05; VanEck Order, 86 FR 64545; WisdomTree Order, 86 FR 69328; Kryptoin Order, 86 FR 74173.

[83] *See* 15 U.S.C. 78f(b)(5).

[84] 17 CFR 240.19b–4(a)(6)(i).

[85] Section 6 of the Exchange Act, 15 U.S.C. 78f, requires national securities exchanges to register with the Commission and requires an exchange's registration to be approved by the Commission, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), requires national securities exchanges to file proposed rules changes with the Commission and provides the Commission with the authority to

Continued

Thus, national securities exchanges are subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.[86] Bitcoin spot trading platforms, on the other hand, have none of these requirements (none are registered as a national securities exchange) [87]—even if they may be ''licensed to engage in bitcoin trading involving New York-based customers.'' [88]

The Commission thus concludes that the Exchange has not demonstrated that the proposed valuation methodology makes the proposed ETP resistant to manipulation. While the proposed valuation methodology may be intended to provide some degree of protection against manipulation in bitcoin markets, the methodology is not sufficient for the Commission to dispense with the requisite surveillance-sharing agreement with a regulated market of significant size.

Second, the Exchange does not explain the significance of the valuation methodology's purported resistance to manipulation to the overall analysis of whether the proposal to list and trade the Shares is designed to prevent fraud and manipulation. Even assuming that the Exchange's argument is that, if the valuation methodology is resistant to manipulation, the Trust's NAV, and thereby the Shares as well, would be resistant to manipulation, the Exchange has not established in the record a basis for such conclusion. That assumption aside, the Commission notes that the Shares would trade at market-based prices in the secondary market, not at NAV, which then raises the question of the significance of the NAV calculation to the manipulation of the Shares.

Third, the Exchange's arguments are contradictory. While arguing that the valuation methodology is resistant to manipulation, the Exchange simultaneously downplays its importance in light of the Trust's in-kind creation and redemption mechanism.[89] The Exchange points out that the Trust will create and redeem Shares in-kind, not in cash, which renders the valuation methodology, and thereby the ability to manipulate NAV, ''significantly less important.'' [90] In BZX's own words, the Trust will not accept cash to buy bitcoin in order to create shares or sell bitcoin to pay cash for redeemed shares, so the price that the Sponsor uses to value the Trust's bitcoin ''is not particularly important.'' [91] If the methodology that the Trust uses to value the Trust's bitcoin ''is not particularly important,'' it follows that the methodology's resistance to manipulation is not material to the Shares' susceptibility to fraud and manipulation. As the Exchange does not address or provide any analysis with respect to these issues, the Commission cannot conclude that the valuation methodology aids in the determination that the proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices.

Finally, the Commission finds that BZX has not demonstrated that in-kind creations and redemptions provide the Shares with a unique resistance to manipulation. The Commission has previously addressed similar assertions.[92] As the Commission stated before, in-kind creations and redemptions are a common feature of ETPs, and the Commission has not previously relied on the in-kind creation and redemption mechanism as a basis for excusing exchanges that list ETPs from entering into surveillance-sharing agreements with significant, regulated markets related to the portfolio's assets.[93] Accordingly, the Commission is not persuaded here that the Trust's in-kind creations and redemptions afford it a unique resistance to manipulation.[94]

(2) Assertions That BZX Has Entered Into a Comprehensive Surveillance-Sharing Agreement With a Regulated Market of Significant Size

As BZX has not demonstrated that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, the Commission next examines whether the record supports the conclusion that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size relating to the underlying assets. In this context, the term ''market of significant size'' includes a market (or group of markets) as to which (i) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to

disapprove proposed rule changes that are not consistent with the Exchange Act. Designated contract markets (''DCMs'') (commonly called ''futures markets'') registered with and regulated by the Commodity Futures Trading Commission (''CFTC'') must comply with, among other things, a similarly comprehensive range of regulatory principles and must file rule changes with the CFTC. *See, e.g.,* Designated Contract Markets (DCMs), CFTC, *available at http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.*

[86] *See* Winklevoss Order, 83 FR 37597. The Commission notes that the NYSDFS has issued ''guidance'' to supervised virtual currency business entities, stating that these entities must ''implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing.'' *See* Maria T. Vullo, Superintendent of Financial Services, NYSDFS, *Guidance on Prevention of Market Manipulation and Other Wrongful Activity* (Feb. 7, 2018), *available at https://www.dfs.ny.gov/docs/legal/industry/il180207.pdf.* The NYSDFS recognizes that its ''guidance is not intended to limit the scope or applicability of any law or regulation'' (*id.*), which would include the Exchange Act. Further, as stated previously, there are substantial differences between the NYSDFS and the Commission's regulation. Anti-Money Laundering (''AML'') and Know-Your-Customer (''KYC'') policies and procedures, for example, have been referenced in other bitcoin-based ETP proposals as a purportedly alternative means by which such ETPs would be uniquely resistant to manipulation. The Commission has previously concluded that such AML and KYC policies and procedures do not serve as a substitute for, and are not otherwise dispositive in the analysis regarding the importance of, having a surveillance sharing agreement with a regulated market of significant size relating to bitcoin. For example, AML and KYC policies and procedures do not substitute for the sharing of information about market trading activity or clearing activity and do not substitute for regulation of a national securities exchange. *See* USBT Order, 85 FR 12603 n.101. *See also, e.g.,* WisdomTree Order, 86 FR 69328 n.95; Kryptoin Order, 86 FR 74173 n.98.

[87] *See* 15 U.S.C. 78e, 78f.

[88] *See* Notice, 86 FR 47185.

[89] *See supra* notes 70–74 and accompanying text.

[90] *See* Notice, 86 FR 47184 (''While the Sponsor believes that the methodology which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the valuation methodology significantly less important.'').

[91] *See id.* (concluding that ''because the Trust will not accept cash to buy bitcoin in order to create new shares, will charge fees as a percentage of the Trust's bitcoin holdings measure[d] in bitcoin and not in dollars, and, barring a forced redemption of the Trust or under other extraordinary circumstances, will not be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'').

[92] *See* Winklevoss Order, 83 FR 37589–90; USBT Order, 85 FR 12607–08; VanEck Order, 86 FR 64546; WisdomTree Order, 86 FR 69329; Kryptoin Order, 86 FR 74174; SkyBridge Order, 87 FR 3874; Wise Origin Order, 87 FR 5533.

[93] *See, e.g.,* iShares COMEX Gold Trust, Securities Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14969, 14974 (Mar. 24, 2006) (SR–Amex–2005–072).

[94] Putting aside the Exchange's various assertions about the nature of bitcoin and the bitcoin market, the valuation methodology, and the Shares, the Exchange also does not address concerns the Commission has previously identified, including the susceptibility of bitcoin markets to potential trading on material, non-public information (such as plans of market participants to significantly increase or decrease their holdings in bitcoin; new sources of demand for bitcoin; the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain, which would create two different, non-interchangeable types of bitcoin), or to the dissemination of false or misleading information. *See* Winklevoss Order, 83 FR 37585. *See also* USBT Order, 85 FR 12600–01; WisdomTree Order, 86 FR 69329 n.114; Kryptoin Order, 86 FR 74174 n.107; SkyBridge Order, 87 FR 3872; Wise Origin Order, 87 FR 5533 n.89.

trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (ii) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[95]

As the Commission has stated in the past, it considers two markets that are members of the ISG to have a comprehensive surveillance-sharing agreement with one another, even if they do not have a separate bilateral surveillance-sharing agreement.[96] Accordingly, based on the common membership of BZX and the CME in the ISG,[97] BZX has the equivalent of a comprehensive surveillance-sharing agreement with the CME. However, while the Commission recognizes that the CFTC regulates the CME futures market,[98] including the CME bitcoin futures market, and thus such market is ''regulated,'' in the context of the proposed ETP, the record does not, as explained further below, establish that the CME bitcoin futures market is a ''market of significant size'' as that term is used in the context of the applicable standard here.

(i) Whether There Is a Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on the CME Bitcoin Futures Market To Successfully Manipulate the ETP

The first prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that there is a reasonable likelihood that a person attempting to manipulate the ETP would have to trade on the CME bitcoin futures market to successfully manipulate the ETP.

BZX notes that the CME began to offer trading in bitcoin futures in 2017.[99] According to BZX, nearly every measurable metric related to CME bitcoin futures contracts, which trade and settle like other cash-settled commodity futures contracts, has ''trended consistently up since launch and/or accelerated upward in the past year.'' [100] For example, according to BZX, there was approximately $28 billion in trading in CME bitcoin futures in December 2020 compared to $737 million, $1.4 billion, and $3.9 billion in total trading in December 2017, December 2018, and December 2019, respectively.[101] Additionally, CME bitcoin futures traded over $1.2 billion per day in December 2020 and represented $1.6 billion in open interest compared to $115 million in December 2019.[102] Similarly, BZX contends that the number of large open interest holders [103] has continued to increase, even as the price of bitcoin has risen, as have the number of unique accounts trading CME bitcoin futures.[104]

BZX argues that the significant growth in CME bitcoin futures across each of trading volumes, open interest, large open interest holders, and total market participants since the USBT Order was issued is reflective of that market's growing influence on the spot price. BZX asserts that where CME bitcoin futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market would have to participate in the CME bitcoin futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the CME bitcoin futures market ''because the NAV is based on the price of bitcoin on the principal market, which identified market must be an active market with orderly transactions.'' [105]

BZX further states that academic research corroborates the overall trend outlined above and supports the thesis that CME bitcoin futures pricing leads the spot market. BZX asserts that academic research demonstrates that the CME bitcoin futures market was already leading the spot price in 2018 and 2019.[106] BZX concludes that a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP.[107]

The Commission disagrees. The record does not demonstrate that there is a reasonable likelihood that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate it. Specifically, BZX's assertions about the general upward trends from 2018 to February 2021 in trading volume and open interest of, and in the number of large open interest holders and number of unique accounts trading in, CME bitcoin futures do not establish that the CME bitcoin futures market is of significant size. While BZX provides data showing *absolute* growth in the size of the CME bitcoin futures market, it provides no data *relative* to the concomitant growth in either the bitcoin spot markets or other bitcoin futures markets (including unregulated futures markets). Moreover, even if the CME has grown in relative size, as the Commission has previously articulated, the interpretation of the term ''market of significant size'' or ''significant market'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[108] BZX's recitation of data reflecting the size of the CME bitcoin futures market, alone, either currently or in relation to previous years, is not sufficient to establish an interrelationship between the CME bitcoin futures market and the proposed ETP.[109]

[95] *See* Winklevoss Order, 83 FR 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that provides guidance to market participants. *See id.*

[96] *See id.* at 37580 n.19.

[97] *See* Notice, 86 FR 47183 n.56 and accompanying text. BZX also states that it has surveillance-sharing agreements with ''several spot bitcoin exchanges'' with ''material volume.'' *See id.* at 47183 & n.55. BZX does not identify the platforms with which it has such agreements and does not provide any information on the scope, terms, or enforcement authority for such surveillance-sharing agreements. Further, as described above, spot bitcoin platforms are not ''regulated.'' They are not registered as ''exchanges'' and lack the obligations, authority, and oversight of national securities exchanges. *See supra* notes 82–88 and accompanying text.

[98] While the Commission recognizes that the CFTC regulates the CME, the CFTC is not responsible for direct, comprehensive regulation of the underlying bitcoin spot market. *See* Winklevoss Order, 83 FR 37587, 37599. *See also* WisdomTree Order, 86 FR 69330 n.118; Kryptoin Order, 86 FR 74174 n.119; SkyBridge Order, 87 FR 3874 n.80; Wise Origin Order, 87 FR 5534 n.93.

[99] According to BZX, each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate. *See* Notice, 86 FR 47181.

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] BZX represents that a large open interest holder in CME bitcoin futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. According to BZX, at a price of approximately $30,000 per bitcoin on December 31, 2020, more than 80 firms had outstanding positions of greater than $3.8 million in CME bitcoin futures. *See id.* at 47181 n.50.

[104] *See id.* at 47181.

[105] *See id.* at 47183.

[106] *See id.* at 47182 & n.51 (citing Y. Hu, Y. Hou & L. Oxley, *What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective,* 72 Int'l Rev. of Fin. Analysis 101569 (2020) (available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*) (''Hu, Hou & Oxley'')).

[107] *See id.* at 47183.

[108] *See* USBT Order, 85 FR 12611. *See also* WisdomTree Order, 86 FR 69330; Kryptoin Order, 86 FR 74175; SkyBridge Order, 87 FR 3875; Wise Origin Order, 87 FR 5534.

[109] *See* USBT Order, 85 FR 12612. The Commission has previously considered and rejected similar arguments. *See, e.g.,* VanEck Order, 86 FR 64547; Kryptoin Order, 86 FR 74175–76; SkyBridge Order, 87 FR 3875–76; Wise Origin Order, 87 FR 5534–35. As for the Exchange's statement that a potential manipulator of the Shares would have to transact in the CME bitcoin futures market ''because the NAV is based on the price of bitcoin on the principal market, which identified market must be an active market with orderly transactions,'' the Exchange does not elaborate further, and the statement is nonsensical. The Exchange does not

Continued

Further, the econometric evidence in the record for this proposal also does not support a conclusion that an interrelationship exists between the CME bitcoin futures market and the bitcoin spot market such that it is reasonably likely that a person attempting to manipulate the proposed ETP would also have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP.[110] While BZX states that CME bitcoin futures pricing leads the spot market,[111] it relies on the findings of a price discovery analysis in one section of a single academic paper to support the overall thesis.[112] However, the findings of that paper's Granger causality analysis, which is widely used to formally test for lead-lag relationships, are concededly mixed.[113] In addition, the Commission considered an unpublished version of the paper in the USBT Order, as well as a comment letter submitted by the authors on that record.[114] In the USBT Order, as part of the Commission's conclusion that ''mixed results'' in academic studies failed to demonstrate that the CME bitcoin futures market constitutes a market of significant size, the Commission noted the paper's inconclusive evidence that CME bitcoin futures prices lead spot prices—in particular that the months at the end of the paper's sample period showed that the spot market was the leading market—and stated that the record did not include evidence to explain why this would not indicate a shift towards prices in the spot market leading the futures market that would be expected to persist into the future.[115] The Commission also stated that the paper's use of daily price data, as opposed to intraday prices, may not be able to distinguish which market incorporates new information faster.[116] BZX has not addressed either issue.[117]

Moreover, BZX does not provide results of its own analysis and does not present any other data supporting its conclusion. BZX's unsupported representations constitute an insufficient basis for approving a proposed rule change in circumstances where, as here, the Exchange's assertion would form such an integral role in the Commission's analysis and the assertion is subject to several challenges.[118] In this context, BZX's reliance on a single paper, whose own lead-lag results are inconclusive, is especially lacking because the academic literature on the lead-lag relationship and price discovery between bitcoin spot and futures markets is unsettled.[119] In the USBT Order, the Commission responded to multiple academic papers that were cited and concluded that, in light of the mixed results found, the exchange there had not demonstrated that it is reasonably likely that a would-be manipulator of the proposed ETP would transact on the CME bitcoin futures market.[120] Likewise, here, given the body of academic literature to indicate to the contrary, the Commission concludes that the information that BZX provides is not a sufficient basis to support a determination that it is reasonably likely that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market.[121]

The Commission accordingly concludes that the information provided in the record for this proposal does not establish a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP. Therefore, the information in the record also does not establish that the CME bitcoin futures market is a ''market of significant size'' with respect to the proposed ETP.

(ii) Whether It Is Unlikely That Trading in the Proposed ETP Would Be the Predominant Influence on Prices in the CME Bitcoin Futures Market

The second prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.[122]

BZX asserts that trading in the Shares would not be the predominant force on

explain, for example, the connection between the CME bitcoin futures market and the principal market or the NAV. Moreover, the Trust does not create or redeem in cash based on NAV and the Shares do not trade based on NAV but on market-based prices in the secondary market.

[110] *See* USBT Order, 85 FR 12611. Listing exchanges have attempted to demonstrate such an ''interrelationship'' by presenting the results of various econometric ''lead-lag'' analyses. The Commission considers such analyses to be central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the CME bitcoin futures market. *See id.* at 12612. *See also* VanEck Order, 86 FR 64547; WisdomTree Order, 86 FR 69330–31; Kryptoin Order, 86 FR 74176 n.144; SkyBridge Order, 87 FR 3876 n.101; Wise Origin Order, 87 FR 5535 n.107.

[111] *See* Notice, 86 FR 47182.

[112] *See supra* note 106 and accompanying text. BZX references the following conclusion from the ''time-varying price discovery'' section of Hu, Hou & Oxley: ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective . . .'' *See* Notice, 86 FR 47182 n.51.

[113] The paper finds that the CME bitcoin futures market dominates the spot markets in terms of Granger causality, but that the causal relationship is bi-directional, and a Granger causality episode from March 2019 to June/July 2019 runs from bitcoin spot prices to CME bitcoin futures prices. The paper concludes: ''[T]he Granger causality episodes are not constant throughout the whole sample period. Via our causality detection methods, market participants can identify when markets are being led by futures prices and when they might not be.'' *See* Hu, Hou & Oxley, *supra* note 106.

[114] *See* USBT Order, 85 FR 12609.

[115] *See id.* at 12613 n.244.

[116] *See id.*

[117] *See* VanEck Order, 86 FR 64547; WisdomTree Order, 86 FR 69331; Kryptoin Order, 86 FR 74176; Wise Origin Order, 87 FR 5535.

[118] *See Susquehanna,* 866 F.3d at 447.

[119] *See, e.g.,* D. Baur & T. Dimpfl, *Price discovery in bitcoin spot or futures?,* 39 J. Futures Mkts. 803 (2019) (finding that the bitcoin spot market leads price discovery); O. Entrop, B. Frijns & M. Seruset, *The determinants of price discovery on bitcoin markets,* 40 J. Futures Mkts. 816 (2020) (finding that price discovery measures vary significantly over time without one market being clearly dominant over the other); J. Hung, H. Liu & J. Yang, *Trading activity and price discovery in Bitcoin futures markets,* 62 J. Empirical Finance 107 (2021) (finding that the bitcoin spot market dominates price discovery); B. Kapar & J. Olmo, *An analysis of price discovery between Bitcoin futures and spot markets,* 174 Econ. Letters 62 (2019) (finding that bitcoin futures dominate price discovery); E. Akyildirim, S. Corbet, P. Katsiampa, N. Kellard & A. Sensoy, *The development of Bitcoin futures: Exploring the interactions between cryptocurrency derivatives,* 34 Fin. Res. Letters 101234 (2020) (finding that bitcoin futures dominate price discovery); A. Fassas, S. Papadamou, & A. Koulis, *Price discovery in bitcoin futures,* 52 Res. Int'l Bus. Fin. 101116 (2020) (finding that bitcoin futures play a more important role in price discovery); S. Aleti & B. Mizrach, *Bitcoin spot and futures market microstructure,* 41 J. Futures Mkts. 194 (2021) (finding that relatively more price discovery occurs on the CME as compared to four spot exchanges); J. Wu, K. Xu, X. Zheng & J. Chen, *Fractional cointegration in bitcoin spot and futures markets,* 41 J. Futures Mkts. 1478 (2021) (finding that CME bitcoin futures dominate price discovery). *See also* C. Alexander & D. Heck, *Price discovery in Bitcoin: The impact of unregulated markets,* 50 J. Financial Stability 100776 (2020) (finding that, in a multi-dimensional setting, including the main price leaders within futures, perpetuals, and spot markets, CME bitcoin futures have a very minor effect on price discovery; and that faster speed of adjustment and information absorption occurs on the unregulated spot and derivatives platforms than on CME bitcoin futures).

[120] *See* USBT Order, 85 FR 12613 nn.239–244 and accompanying text.

[121] In addition, the Exchange fails to address the relationship (if any) between prices on other bitcoin futures markets and the CME bitcoin futures market, the bitcoin spot market, and/or any particular spot platform that could be the ''principal market'' for purposes of the Trust's valuation methodology, or where price formation occurs when the entirety of bitcoin futures markets, not just CME, is considered. *See* VanEck Order, 86 FR 64547–48; WisdomTree Order, 86 FR 69331; Kryptoin Order, 86 FR 74176; Wise Origin Order, 87 FR 5535.

[122] *See* Winklevoss Order, 83 FR 37594; USBT Order, 85 FR 12596–97.

prices in the CME bitcoin futures market (or spot market) because of the significant volume in the CME bitcoin futures market, the size of bitcoin's market capitalization, which is approximately $1 trillion, and the significant liquidity available in the spot market.[123] BZX provides that, according to February 2021 data, the cost to buy or sell $5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.[124] For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, BZX states that a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5 percent.[125] BZX further asserts that more strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market, which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.[126] Thus, BZX concludes that the combination of CME bitcoin futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants (including authorized participants creating and redeeming in-kind with the Trust) to buy or sell large amounts of bitcoin without significant market impact, will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or the CME bitcoin futures market.[127]

The Commission does not agree. The record does not demonstrate that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. As the Commission has already addressed and rejected one of the bases of BZX's assertion—that CME bitcoin futures leads price discovery [128]—it will only address below the other two bases: The overall size of, and the impact of buys and sells on, the bitcoin market.

BZX's assertions about the potential effect of trading in the Shares on the CME bitcoin futures market and bitcoin spot market are general and conclusory, repeating the aforementioned trade volume of the CME bitcoin futures market and the size and liquidity of the bitcoin spot market, as well as the market impact of a large transaction, without any analysis or evidence to support these assertions. For example, there is no limit on the amount of mined bitcoin that the Trust may hold. Yet BZX does not provide any information on the expected growth in the size of the Trust and the resultant increase in the amount of bitcoin held by the Trust over time, or on the overall expected number, size, and frequency of creations and redemptions—or how any of the foregoing could (if at all) influence prices in the CME bitcoin futures market. Thus, the Commission cannot conclude, based on BZX's statements alone and absent any evidence or analysis in support of BZX's assertions, that it is unlikely that trading in the ETP would be the predominant influence on prices in the CME bitcoin futures market.[129]

The Commission also is not persuaded by BZX's assertions about the minimal effect a large market order to buy or sell bitcoin would have on the bitcoin market.[130] While BZX concludes by way of a $10 million market order example that buying or selling large amounts of bitcoin would have insignificant market impact, the conclusion does not analyze the extent of any impact on the CME bitcoin futures market. Even assuming that BZX is suggesting that a single $10 million order in bitcoin would have immaterial impact on the prices in the CME bitcoin futures market, this prong of the ''market of significant size'' determination concerns the influence on prices from trading *in* the proposed ETP, which is broader than just trading *by* the proposed ETP. While authorized participants of the Trust might only transact in the bitcoin spot market as part of their creation or redemption of Shares, the Shares themselves would be traded in the secondary market on BZX. The record does not discuss the expected number or trading volume of the Shares, or establish the potential effect of the Shares' trade prices on CME bitcoin futures prices. For example, BZX does not provide any data or analysis about the potential effect the quotations or trade prices of the Shares might have on market-maker quotations in CME bitcoin futures contracts and whether those effects would constitute a predominant influence on the prices of those futures contracts.[131]

Thus, because BZX has not provided sufficient information to establish both prongs of the ''market of significant size'' determination, the Commission cannot conclude that the CME bitcoin futures market is a ''market of significant size'' such that BZX would be able to rely on a surveillance-sharing agreement with the CME to provide sufficient protection against fraudulent and manipulative acts and practices.

The requirements of Section 6(b)(5) of the Exchange Act apply to the rules of national securities exchanges. Accordingly, the relevant obligation for a comprehensive surveillance-sharing agreement with a regulated market of significant size, or other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement, resides with the listing exchange. Because there is insufficient evidence in the record demonstrating that BZX has satisfied this obligation, the Commission cannot approve the proposed ETP for listing and trading on BZX.

C. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Protect Investors and the Public Interest

BZX contends that, if approved, the proposed ETP would protect investors and the public interest. However, the Commission must consider these potential benefits in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[132] Because BZX has not demonstrated that its proposed rule change is designed to prevent fraudulent and manipulative acts and practices, the Commission must disapprove the proposal.

BZX asserts that, with the growth of U.S. investor exposure to bitcoin through OTC bitcoin funds, so too has grown the potential risk to U.S. investors.[133] Specifically, BZX argues

[123] *See* Notice, 86 FR 47184.

[124] *See id.* According to BZX, these statistics are based on samples of bitcoin liquidity in U.S. dollars (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021. *See id.* at 47184 nn.59–60.

[125] *See id.* at 47184.

[126] *See id.*

[127] *See id.*

[128] *See supra* notes 110–121 and accompanying text.

[129] *See* VanEck Order, 86 FR 64548–59; WisdomTree Order, 86 FR 69332–33; Kryptoin Order, 86 FR 74177; SkyBridge Order, 87 FR 3879; Wise Origin Order, 87 FR 5537.

[130] *See* Notice, 86 FR 47184 (''For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5%.'').

[131] *See* VanEck Order, 86 FR 64549; WisdomTree Order, 86 FR 69333; Kryptoin Order, 86 FR 74177; SkyBridge Order, 87 FR 3879; Wise Origin Order, 87 FR 5537.

[132] *See* Winklevoss Order, 83 FR 37602. *See also* GraniteShares Order, 83 FR 43931; ProShares Order, 83 FR 43941; USBT Order, 85 FR 12615. *See also* WisdomTree Order, 86 FR 69333; Valkyrie Order, 86 FR 74163; Kryptoin Order, 86 FR 74178; SkyBridge Order, 87 FR 3880; Wise Origin Order, 87 FR 5537.

[133] *See* Notice, 86 FR 47179.

that premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis and that such risk could potentially be eliminated through access to a bitcoin ETP.[134] As such, the Exchange believes that approving this proposal (and comparable proposals submitted hereafter) would give U.S. investors access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) providing an alternative to custodying spot bitcoin; and (iv) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure.[135]

According to BZX, OTC bitcoin funds are generally designed to provide exposure to bitcoin in a manner similar to the Shares. However, unlike the Shares, BZX states that ''OTC bitcoin funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV and, as such, frequently trade at a price that is out-of-line with the value of their assets held.'' [136] BZX represents that, historically, OTC bitcoin funds have traded at a significant premium to NAV.[137] Although the Exchange concedes that trading at a premium (or potentially a discount) is not unique to OTC bitcoin funds and not inherently problematic, BZX believes that it raises certain investor protections issues. First, according to BZX, investors are buying shares of a fund for a price that is not reflective of the per share value of the fund's underlying assets.[138] Second, according to BZX, because only accredited investors, generally, are able to create or redeem shares with the issuing trust and can buy or sell shares directly with the trust at NAV (in exchange for either cash or bitcoin) without having to pay the premium or sell into the discount, these investors that are allowed to interact directly with the trust are able to hedge their bitcoin exposure as needed to satisfy holding requirements and collect on the premium or discount opportunity. BZX argues, therefore, that the premium in OTC bitcoin funds essentially creates a direct payment from retail investors to more sophisticated investors.[139]

BZX also asserts that exposure to bitcoin through an ETP also presents advantages for retail investors compared to buying spot bitcoin directly.[140] BZX asserts that, without the advantages of an ETP, an individual retail investor holding bitcoin through a cryptocurrency trading platform lacks protections.[141] BZX explains that, typically, retail platforms hold most, if not all, retail investors' bitcoin in ''hot'' (internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard.[142] Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.,* insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings.[143] BZX represents that the custodian would, by contrast, use ''cold'' (offline) storage to hold private keys, employ a certain degree of cybersecurity measures and operational best practices, be highly experienced in bitcoin custody, and be accountable for failures.[144] In addition, BZX represents that the custodian would be a chartered trust company that carries insurance covering both hot and cold storage, and ''will custody the Trust's bitcoin assets in a manner so that it meets the definition of qualified custodian'' under the Investment Advisers Act of 1940, as amended.[145] Thus, with respect to custody of the Trust's bitcoin assets, BZX concludes that, compared to owning spot bitcoin directly, the Trust presents advantages from an investment protection standpoint for retail investors.[146]

BZX further asserts that a number of operating companies engaged in unrelated businesses have announced investments as large as $1.5 billion in bitcoin.[147] Without access to bitcoin ETPs, BZX argues that retail investors seeking investment exposure to bitcoin may purchase shares in these companies in order to gain the exposure to bitcoin that they seek.[148] BZX contends that such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with additional risks associated with whichever operating company they decide to purchase. BZX concludes that investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.[149]

BZX also states that investors in many other countries, including Canada, are able to use more traditional exchange-listed and traded products to gain exposure to bitcoin, disadvantaging U.S. investors and leaving them with more risky and more expensive means of getting bitcoin exposure.[150]

In essence, BZX asserts that the risky nature of direct investment in the underlying bitcoin and the unregulated markets on which bitcoin and OTC bitcoin funds trade compel approval of the proposed rule change. The Commission disagrees. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the

[134] *See id.* BZX states that while it understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, it now believes that ''such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal.'' *See id.*

[135] *See id.*

[136] *See id.* BZX also states that, unlike the Shares, because OTC bitcoin funds are not listed on an exchange, they are not subject to the same transparency and regulatory oversight by a listing exchange. BZX further asserts that the existence of a surveillance-sharing agreement between BZX and the CME bitcoin futures market would result in increased investor protections for the Shares compared to OTC bitcoin funds. *See id.* at 47179 n.38.

[137] *See id.* at 47179. BZX further represents that the inability to trade in line with NAV may at some point result in OTC bitcoin funds trading at a discount to their NAV. According to BZX, while that has not historically been the case, trading at a discount would give rise to nearly identical potential issues related to trading at a premium. *See id.* at 47179 n.39.

[138] *See id.* at 47180.

[139] *See id.*

[140] *See id.*

[141] *See id.*

[142] *See id.*

[143] *See id.*

[144] *See id.*

[145] *See id.*

[146] *See id.*

[147] *See id.*

[148] *See id.*

[149] *See id.* at 47181.

[150] *See id.* at 47179. BZX represents that the Purpose Bitcoin ETF, a retail bitcoin-based ETP launched in Canada, reportedly reached $421.8 million in assets under management in two days, demonstrating the demand for a North American market listed bitcoin ETP. BZX contends that the Purpose Bitcoin ETF also offers a class of units that is U.S. dollar denominated, which could appeal to U.S. investors. BZX also argues that, without an approved bitcoin ETP in the U.S. as a viable alternative, U.S. investors could seek to purchase these shares in order to get access to bitcoin exposure. BZX believes that, given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange-listed ETP. *See id.* at 47179 n.36. BZX also notes that regulators in other countries have either approved or otherwise allowed the listing and trading of bitcoin-based ETPs. *See id.* at 47179 n.37.

Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.[151] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.[152]

Here, even if it were true that, compared to trading in unregulated bitcoin spot markets, trading a bitcoin-based ETP on a national securities exchange provides some additional protection to investors, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[153] As explained above, for bitcoin-based ETPs, the Commission has consistently required that the listing exchange have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin, or demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The listing exchange has not met that requirement here. Therefore, the Commission is unable to find that the proposed rule change is consistent with the statutory standard.

Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices.[154]

For the reasons discussed above, BZX has not met its burden of demonstrating that the proposal is consistent with Exchange Act Section 6(b)(5),[155] and, accordingly, the Commission must disapprove the proposal.[156]

D. Other Comments

One comment letter also addresses the general nature and uses of bitcoin.[157] Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–CboeBZX–2021–052 be, and hereby is, disapproved.

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2022–05500 Filed 3–15–22; 8:45 am]

BILLING CODE 8011–01–P

[151] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[152] *See* SolidX Order, 82 FR 16259; VanEck Order, 86 FR 54550–51; WisdomTree Order, 86 FR 69344; Kryptoin Order, 86 FR 74179; Valkyrie Order, 86 FR 74163; SkyBridge Order, 87 FR 3881; Wise Origin Order, 87 FR 5538.

[153] *See supra* note 132.

[154] *See* 15 U.S.C. 78s(b)(2)(C).

[155] 15 U.S.C. 78f(b)(5).

[156] In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[157] *See* letter from Sam Ahn (Aug. 31, 2021).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94394; File No. SR–MEMX–2022–01]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

March 10, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 28, 2022, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members [3] (the ''Fee Schedule'') pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on March 1, 2022. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to: (i) Adopt a new NBBO Setter Tier that provides an additive rebate for executions of orders in securities priced at or above $1.00 per share that add displayed liquidity to the Exchange (such orders, ''Added Displayed Volume'') and that establish the national best bid or offer (''NBBO''); (ii) modify the Exchange's pricing for executions of orders in securities priced at or above $1.00 per share that add non-displayed liquidity to the Exchange (such orders, ''Added Non-Displayed Volume'') by reducing the standard rebates for such executions and adopting tiered pricing under new Non-Display Add Tiers that provide enhanced rebates for such executions; (iii) modify the required criteria under Liquidity Provision Tier 3; (iv) reduce the standard rebate for executions of Added Displayed Volume; (v) reduce the standard rebate for executions of Retail Orders [4] in

[3] *See* Exchange Rule 1.5(p).

[4] A ''Retail Order'' means an agency or riskless principal order that meets the criteria of FINRA

Continued

securities priced at or above $1.00 per share that add displayed liquidity to the Exchange (such orders, ''Added Displayed Retail Volume''); (vi) increase the standard fee for executions of orders in securities priced at or above $1.00 per share that remove liquidity from the Exchange (such orders ''Removed Volume''); (vii) modify Liquidity Removal Tier 1 by increasing the fee for executions of Removed Volume and modifying the required criteria under such tier; (viii) eliminate the DLI Additive Rebate for DLI Tier 2; and (ix) eliminate the Targeted Step-Up Tier.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16.5% of the total market share of executed volume of equities trading.[5] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 4% of the overall market share.[6] The Exchange in particular operates a ''Maker-Taker'' model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Adoption of NBBO Setter Tier

The Exchange proposes to adopt a new volume-based tier, referred to by the Exchange as the NBBO Setter Tier, in which the Exchange will provide an additive rebate for executions of Added Displayed Volume (other than Retail Orders) that establish the NBBO (such orders, ''Setter Volume'').[7] Under the proposed NBBO Setter Tier, the Exchange will provide an additive rebate of $0.0003 per share for executions of Setter Volume for a Member that qualifies for the NBBO Setter Tier by achieving an ADAV[8] with respect to orders with Fee Code ''B'' (as assigned on the execution reports provided by the Exchange[9]) that is equal to or greater than 0.10% of the TCV.[10] The $0.0003 per share additive rebate will be provided in addition to the rebate that is otherwise applicable to each of a qualifying Members' orders that constitutes Setter Volume (including a rebate provided under another pricing tier/incentive).[11] The Exchange notes that the additive rebate will not apply to executions of orders in securities priced below $1.00 per share.

The proposed NBBO Setter Tier is designed to attract aggressively priced displayed liquidity to the Exchange by providing an additional rebate for executions of Setter Volume to Members that contribute to establishing the NBBO on the Exchange by achieving the Fee Code ''B'' volume threshold described above, thereby promoting price discovery and market quality on the Exchange. The Exchange notes that the proposed NBBO Setter Tier is comparable to other volume-based incentives and discounts, which have been widely adopted by exchanges (including the Exchange), including similar pricing incentives applicable to executions of orders that establish the NBBO.[12]

Modify Pricing for Added Non-Displayed Volume

The Exchange proposes to modify its pricing for executions of Added Non-Displayed Volume by reducing the standard rebates for such executions and adopting tiered pricing under new Non-Display Add Tiers that provide enhanced rebates for such executions. Added Non-Displayed Volume includes both: (i) Pegged Orders[13] with a Midpoint Peg[14] instruction (such orders, ''Midpoint Peg orders'') in securities priced at or above $1.00 per share that add liquidity to the Exchange (such orders, ''Added Midpoint Volume'') and (ii) orders that are not Midpoint Peg orders in securities priced at or above $1.00 per share that add non-displayed liquidity to the Exchange (such orders, ''Added Non-Midpoint Hidden Volume'').

Currently, the Exchange provides standard rebates of $0.0025 per share and $0.0020 per share for executions of Added Midpoint Volume and Added Non-Midpoint Hidden Volume, respectively. The Exchange now proposes to reduce each of these

Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization (''RMO''), provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Exchange Rule 11.21(a).

[5] Market share percentage calculated as of February 25, 2022. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[6] *Id.*

[7] An order that is entered at the most aggressive price both on the Exchange's order book and according to the then-current consolidated data from the applicable securities information processor and direct data feeds used by the Exchange will be determined to have established the NBBO for purposes of the NBBO Setter Tier without regard to whether a more aggressive order is entered prior to the original order being executed.

[8] As set forth on the Fee Schedule, ''ADAV'' means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis.

[9] The Exchange notes that all orders (other than Retail Orders, which are assigned a Fee Code of ''Br'') in securities priced below, at or above $1.00 per share that add displayed liquidity to the Exchange and that establish the NBBO are assigned a Fee Code of ''B'' on the execution reports provided by the Exchange. The Exchange further notes that the Fee Code assigned to any such order to indicate that such order also qualifies for a pricing tier/incentive (*e.g.,* ''B1'', ''B2'', ''B3'', ''Bq1'' and ''Bq2'') is not provided on the execution reports but instead is provided on the monthly invoices after a determination of tier/incentive qualification for a particular month has been made; thus, any such order that also qualifies for a pricing tier/incentive would still be assigned a Fee Code of ''B'' (rather than the applicable tier/incentive Fee Code) on the execution reports and would therefore be counted in determining whether a Member qualifies for the NBBO Setter Tier.

[10] As set forth on the Fee Schedule, ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[11] The proposed pricing for the NBBO Setter Tier is referred to by the Exchange on the Fee Schedule under the new description ''NBBO Setter Tier'' with a Fee Code of ''S'' to be appended to the otherwise applicable Fee Code assigned by the Exchange on the monthly invoices for qualifying executions (including Fee Codes ''B'', ''B1'', ''B2'', ''B3'', ''Bq1'' and ''Bq2'').

[12] *See, e.g.,* Securities Exchange Act Release No. 73813 (December 11, 2014), 79 FR 75197 (December 17, 2014) (SR–BATS–2014–063) (notice of filing and immediate effectiveness of fee changes adopted by BATS, including the adoption of ''NBBO Setter Tiers'' that provide additive rebates for executions of orders that establish the NBBO to Members that qualify for such tiers by achieving a specified ADAV threshold with respect to orders that add displayed liquidity and that establish the NBBO).

[13] Pegged Orders are described in Exchange Rules 11.6(h) and 11.8(c) and generally defined as an order that is pegged to a reference price and automatically re-prices in response to changes in the NBBO.

[14] A Midpoint Peg instruction is an instruction that may be placed on a Pegged Order that instructs the Exchange to peg the order to midpoint of the NBBO. *See* Exchange Rule 11.6(h)(2).

standard rebates to $0.0018 per share.[15] The purpose of reducing the standard rebates for executions of Added Midpoint Volume and Add Non-Midpoint Hidden Volume is for business and competitive reasons, as the Exchange believes reducing such rebates as proposed would decrease the Exchange's expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity. The Exchange notes that the proposed standard rebate for executions of Added Midpoint Volume remains higher than, and competitive with, the standard rebates provided by at least one other exchange for executions of similar orders.[16] The Exchange also notes that the proposed standard rebate for executions of Added Non-Midpoint Hidden Volume remains higher than, and competitive with, the standard rebates provided by at least one other exchange for executions of similar orders.[17]

In connection with the proposed reduction of the standard rebates for executions of Added Non-Displayed Volume (*i.e.,* both Added Midpoint Volume and Added Non-Midpoint Hidden Volume) described above, the Exchange is proposing to adopt new volume-based tiers applicable to such executions, referred to by the Exchange as Non-Display Add Tiers 1 and 2, in which the Exchange would provide enhanced rebates for executions of Added Non-Displayed Volume for Members that achieve the associated volume thresholds. Specifically, under proposed Non-Display Add Tier 1, the Exchange would provide a rebate of $0.0028 per share for executions of Added Non-Displayed Volume for Members that qualify for such tier by achieving a Non-Displayed ADAV[18] that is equal to or greater than 5,000,000 shares.[19] Additionally, under proposed Non-Display Add Tier 2, the Exchange would provide a rebate of $0.0024 per share for executions of Added Non-Displayed Volume for Members that qualify for such tier by achieving a Non-Displayed ADAV that is equal to or greater than 1,000,000 shares (but less than 5,000,000 shares).[20] The Exchange proposes to provide Members that qualify for Non-Display Add Tier 1 or Non-Display Add Tier 2 free executions of orders (including Midpoint Peg orders) in securities priced below $1.00 per share that add non-displayed liquidity to the Exchange, which is the same as the standard pricing that is currently applicable to such executions for all Members.

The Exchange believes that the proposed Non-Display Add Tiers provide an incremental incentive for Members to maintain or strive for higher Non-Displayed ADAV on the Exchange in order to qualify for the enhanced rebates for executions of Added Non-Displayed Volume, and as such, are designed to encourage Members to maintain or increase their order flow (particularly in the form of liquidity adding non-displayed orders) to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants. The Exchange notes that the proposed Non-Display Add Tiers are comparable to other volume-based incentives and discounts, which have been widely adopted by exchanges (including the Exchange), including pricing tiers that provide enhanced rebates for executions of Added Non-Displayed Volume.[21]

Modify Criteria Under Liquidity Provision Tier 3

The Exchange currently offers three Liquidity Provision Tiers in which the Exchange provides enhanced rebates for executions of Added Displayed Volume based on a Member achieving the corresponding volume-based threshold (*i.e.,* the required criteria) for a particular tier. Currently, a Member qualifies for Liquidity Provision Tier 3, and thus receives an enhanced rebate of $0.0027 per share for executions of Added Displayed Volume under such tier, by achieving an ADAV that is equal to or greater than 0.05% of the TCV. Now, the Exchange proposes to modify the required criteria under Liquidity Provision Tier 3 such that a Member would now qualify for such tier by achieving any of the three following volume-based thresholds: (1) An ADAV that is equal to or greater than 0.05% of the TCV; (2) a Step-Up Displayed ADAV[22] from February 2022 that is equal to or greater than 0.02% of the TCV; or (3) a Midpoint ADAV[23] that is equal to or greater than 1,000,000 shares. Thus, such proposed changes would keep the existing ADAV threshold intact and also provide two alternative volume thresholds that a Member may choose to achieve in order to qualify for Liquidity Provision Tier 3, including one threshold based on a Member increasing its Displayed ADAV above its Displayed ADAV in February 2022, which is designed to encourage Members to increase their orders that add displayed liquidity to the Exchange,

[15] The proposed standard pricing for executions of Added Midpoint Volume is referred to by the Exchange on the Fee Schedule under the existing description ''Added non-displayed volume, Midpoint Peg'' and such orders will continue to receive a Fee Code of ''M'' on execution reports. The proposed standard pricing for executions of Added Non-Midpoint Hidden Volume is referred to by the Exchange on the Fee Schedule under the existing description ''Added non-displayed volume'' and such orders will continue to receive a Fee Code of ''H'' on execution reports.

[16] *See, e.g.,* the Nasdaq Price List—Trading Connectivity (available at *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2*), which reflects a standard rebate of $0.0014 per share for executions of orders in Tape A and Tape B securities priced at or above $1.00 per share that add non-displayed midpoint liquidity and a standard rebate of $0.0010 per share for executions of orders in Tape C securities priced at or above $1.00 per share that add non-displayed midpoint liquidity.

[17] *See, e.g.,* the Cboe BZX Exchange, Inc. (''Cboe BZX'') equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*), which reflects a standard rebate of $0.0010 per share for executions of orders in securities priced at or above $1.00 per share that add non-displayed liquidity.

[18] As proposed, the term ''Non-Displayed ADAV'' means ADAV with respect to non-displayed orders (including Midpoint Peg orders). The Exchange proposes to add this definition of Non-Displayed ADAV under the ''Definitions'' section of the Fee Schedule.

[19] The proposed pricing for Non-Display Add Tier 1 is referred to by the Exchange on the Fee Schedule under the new description ''Added non-displayed volume, Non-Display Add Tier 1'' with a Fee Code of ''H1'' for qualifying Added Non-Midpoint Hidden Volume and a Fee Code of ''M1'' for qualifying Added Midpoint Volume assigned on the monthly invoices provided by the Exchange. The Exchange notes that because the determination of whether a Member qualifies for Non-Display Add Tier 1 for a particular month will not be made until after the month-end, the Exchange will provide the Fee Code otherwise applicable to such transactions (*i.e.,* ''H'' or ''M'', as applicable) on the execution reports provided to Members during the month, and it will only designate the Fee Code applicable to the achieved pricing tier on the monthly invoices, which are provided after such determination has been made. The Exchange also notes that this is how it applies Fee Codes for its tier-based pricing today and how it will apply Fee Codes for any other tier-based pricing described herein.

[20] The proposed pricing for Non-Display Add Tier 2 is referred to by the Exchange on the Fee Schedule under the new description ''Added non-displayed volume, Non-Display Add Tier 2'' with a Fee Code of ''H2'' for qualifying Added Non-Midpoint Hidden Volume and a Fee Code of ''M2'' for qualifying Added Midpoint Volume assigned on the monthly invoices provided by the Exchange.

[21] For example, Cboe BZX currently offers ''Non-Display Add Volume Tiers'' in which Cboe BZX provides enhanced rebates for executions of orders in securities priced at or above $1.00 per share that add non-displayed liquidity for members that qualify for such tiers by achieving certain specified volume thresholds. *See* the Cboe BZX equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*).

[22] As proposed, the term ''Step-Up Displayed ADAV'' means Displayed ADAV in the relevant baseline month subtracted from current Displayed ADAV. As proposed, the term ''Displayed ADAV'' means ADAV with respect to displayed orders. The Exchange proposes to add these definitions of Step-Up Displayed ADAV and Displayed ADAV under the ''Definitions'' section of the Fee Schedule.

[23] As proposed, the term ''Midpoint ADAV'' means ADAV with respect to Midpoint Peg orders. The Exchange proposes to add this definition of Midpoint ADAV under the ''Definitions'' section of the Fee Schedule.

and one threshold based on a Member maintaining or increasing its Midpoint ADAV above the specified amount, which is designed to encourage Members to maintain or increase their Midpoint Peg orders that add liquidity to the Exchange. The Exchange is not proposing to modify the pricing associated with Liquidity Provision Tier 3.

The Exchange believes that Liquidity Provision Tier 3, as modified, would encourage the submission of more diverse types of order flow to the Exchange, as it provides two additional alternative thresholds based on different types of volume that Members may choose to achieve, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members. The Exchange notes that Liquidity Provision Tier 3, as modified, would continue to be available to all Members and, while the Exchange has no way of predicting with certainty how the proposed new criteria will impact Member activity, the Exchange expects that more Members will qualify for such tier than currently do under the proposed new criteria, as it is more expansive and provides two additional alternative thresholds that Members may choose to achieve.

Reduce Standard Rebate for Added Displayed Volume

Currently, the Exchange provides a standard rebate of $0.0022 per share for executions of Added Displayed Volume. The Exchange now proposes to reduce the standard rebate for executions of Added Displayed Volume to $0.0020 per share.[24] The purpose of reducing the standard rebate for executions of Added Displayed Volume is for business and competitive reasons, as the Exchange believes that reducing such rebate as proposed would decrease the Exchange's expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity. The Exchange notes that despite the reduction proposed herein, the proposed standard rebate for executions of Added Displayed Volume remains in line with, or higher than, the standard rebates provided by other exchanges for executions of orders in securities priced at or above $1.00 per share that add displayed liquidity.[25]

Reduce Standard Rebate for Added Displayed Retail Volume

Currently, the Exchange provides a standard rebate of $0.0037 per share for executions of Added Displayed Retail Volume. The Exchange now proposes to reduce the standard rebate for executions of Added Displayed Retail Volume to $0.0035 per share.[26] The purpose of reducing the standard rebate for executions of Added Displayed Retail Volume is for business and competitive reasons, as the Exchange believes that reducing such rebate as proposed would decrease the Exchange's expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity. The Exchange notes that despite the reduction proposed herein, the proposed standard rebate for executions of Added Displayed Retail Volume remains higher than, and competitive with, the standard rebates provided by other exchanges for executions of attested retail orders in securities priced at or above $1.00 per share that add displayed liquidity.[27]

Increase Standard Fee for Removed Volume

Currently, the Exchange charges a standard fee of $0.0029 per share for executions of Removed Volume. The Exchange now proposes to increase the standard fee for executions of Removed Volume to $0.0030 per share.[28] The purpose of increasing the standard fee for executions of Removed Volume is for business and competitive reasons, as the Exchange believes that increasing such fee as proposed would generate additional revenue to offset some of the costs associated with the Exchange's current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite the increase proposed herein, the proposed standard fee for executions of Removed Volume remains in line with the standard fees charged by other exchanges for executions of orders in securities priced at or above $1.00 per share that remove liquidity.[29]

Modify Liquidity Removal Tier 1

The Exchange currently offers Liquidity Removal Tier 1 in which qualifying Members are charged a discounted fee of $0.0028 per share for executions of Removed Volume by achieving either: (1) An ADAV of at least 0.50% of the TCV; or (2) an ADV of at least 0.70% of the TCV. Now, the Exchange proposes to modify Liquidity Removal Tier 1 by increasing the fee for executions of Removed Volume and modifying the required criteria under such tier. Specifically, the Exchange proposes to charge a fee of $0.00285 per share for executions of Removed Volume for Members that qualify for Liquidity Removal Tier 1 by achieving either: (1) An ADAV of at least 0.30% of the TCV; or (2) an ADV of at least 0.60% of the TCV.[30]

[24] The proposed standard rebate for executions of Added Displayed Volume is referred to by the Exchange on the Fee Schedule under the existing description ''Added displayed volume'' with a Fee Code of ''B'', ''D'' or ''J'', as applicable, on execution reports.

[25] *See, e.g.,* the NYSE Arca, Inc. equities trading fee schedule on its public website (available at *https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf*), which reflects a standard rebate of $0.0020 per share for executions of orders in securities priced at or above $1.00 per share that add displayed liquidity; the Cboe BZX equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*), which reflects a standard rebate of $0.0016 per share for executions of orders in securities priced at or above $1.00 per share that add displayed liquidity; the Nasdaq Stock Market LLC (''Nasdaq'') Price List—Trading Connectivity (available at *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2*), which reflects a standard rebate of $0.0020 per share for executions of orders in Tape A and Tape B securities priced at or above $1.00 per share that add displayed liquidity and a standard rebate of $0.0015 per share for executions of orders in Tape C securities priced at or above $1.00 per share that add displayed liquidity.

[26] The proposed standard rebate for executions of Added Displayed Retail Volume is referred to by the Exchange on the Fee Schedule under the existing description ''Added displayed volume, Retail Order'' with a Fee Code of ''Br'', ''Dr'' or ''Jr'', as applicable, on execution reports.

[27] *See, e.g.,* the Cboe BZX equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/bzx/*), which reflects a standard rebate of $0.0032 per share for executions of attested retail orders in securities priced at or above $1.00 per share that add displayed liquidity; the Cboe EDGX Exchange, Inc. (''Cboe EDGX'') equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/edgx/*), which reflects a standard rebate of $0.0032 per share for executions of attested retail orders in securities priced at or above $1.00 per share that add displayed liquidity.

[28] The proposed standard fee for executions of Removed Volume is referred to by the Exchange on the Fee Schedule under the existing description ''Removed volume from MEMX Book'' with a Fee Code of ''R'' on execution reports.

[29] *See, e.g.,* the Cboe EDGX equities trading fee schedule on its public website (available at *https://www.cboe.com/us/equities/membership/fee_schedule/edgx/*), which reflects a standard fee of $0.0030 per share for executions of orders in securities priced at or above $1.00 per share that remove liquidity; the Nasdaq Price List—Trading Connectivity (available at *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2*), which reflects a standard fee of $0.0030 per share for executions of orders in securities priced at or above $1.00 per share that remove liquidity.

[30] The proposed pricing for Liquidity Removal Tier 1 is referred to by the Exchange on the Fee

The Exchange believes that the proposed fee for executions of Removed Volume under Liquidity Removal Tier 1 represents only a modest increase from the current fee charged for such executions under such tier. The purpose of increasing such fee as proposed is for business and competitive reasons, as the Exchange believes that increasing such fee would generate additional revenue to offset some of the costs associated with the Exchange's current transaction pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that the proposed changes to the required criteria under Liquidity Removal Tier 1 would lower both the ADAV threshold and the ADV threshold such that each threshold would be easier for Members to achieve and, in turn, while the Exchange has no way of predicting with certainty how the proposed new criteria will impact Member activity, the Exchange expects that more Members will strive to qualify for such tier than currently do, resulting in the submission of additional order flow to the Exchange. The Exchange also notes that Liquidity Removal Tier 1, as modified, would continue to be available to all Members.

Eliminate DLI Additive Rebate for DLI Tier 2

The Exchange proposes to eliminate the DLI Additive Rebate for DLI Tier 2. Currently, the Exchange offers DLI Tiers 1 and 2 in which qualifying Members are provided a corresponding enhanced rebate for executions of Added Displayed Volume by quoting at the NBBO for a significant portion of each day in a specified number of securities, including a specified number of DLI Target Securities, with DLI Tier 1 providing a higher rebate than DLI Tier 2 commensurate with NBBO quoting requirements in a larger number of securities. Additionally, the Exchange currently offers a DLI Additive Rebate incentive that is applicable to DLI Tiers 1 and 2, which provides an additive rebate of $0.0001 per share for executions of Added Displayed Volume where: (1) For a Member that qualifies for DLI Tier 1, such Member has an ADAV that is equal to or greater than 0.30% of the TCV; and (2) for a Member that qualifies for DLI Tier 2, such Member has an ADAV that is equal to or greater than 0.10% of the TCV. The Exchange now proposes to eliminate the DLI Additive Rebate for DLI Tier 2, but keep the DLI Additive Rebate for DLI Tier 1. The reason for eliminating the DLI Additive Rebate for DLI Tier 2 is that the incentive is not achieving the level of participation that the Exchange expected, and thus, is not accomplishing the goal that the Exchange had when initially adopting this incentive. Due to the lower-than-expected level of participation, the Exchange does not believe the proposed elimination of Targeted Step-Up Tier [sic] will have a significant impact on any Member's trading behavior on the Exchange. The Exchange therefore no longer wishes to, nor is it required to, maintain such tier. More specifically, the proposed change removes such incentive, as the Exchange would rather redirect future resources and funding into other incentives and tiers intended to incentivize increased order flow. The Exchange notes that several Members currently qualify for the DLI Additive Rebate for DLI Tier 1, which is why the Exchange is not proposing to eliminate that incentive since it has achieved the expected level of participation.

Eliminate Targeted Step-Up Tier

Finally, the Exchange proposes to eliminate the Targeted Step-Up Tier. The Exchange currently offers the Targeted Step-Up Tier in which it provides an additive rebate of $0.0002 per share to executions of orders (other than displayed Retail Orders) in securities priced at or above $1.00 per share that add liquidity to the Exchange (such orders, ''Added Volume'') for Members that qualify for such tier by achieving: (1) A Step-Up ADAV [31] from October 2021 that is equal to or greater than 0.05% of the TCV in the Targeted Step-Up Securities; [32] or (2) an ADAV that is equal to or greater than 0.08% of the TCV in the Targeted Step-Up Securities. The Exchange adopted the Targeted Step-Up Tier in November 2021 for the purpose of encouraging Members to increase their volume on the Exchange in the Targeted Step-Up Securities, thereby improving its market quality with respect to such securities and contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members.[33] The Exchange now proposes to eliminate the Targeted Step-Up Tier, as the incentive is not achieving the level of participation that the Exchange expected, and thus, is not accomplishing the goal that the Exchange had when initially adopting this incentive. Due to the lower-than-expected level of participation, the Exchange does not believe the proposed elimination of Targeted Step-Up Tier will have a significant impact on any Member's trading behavior on the Exchange. The Exchange therefore no longer wishes to, nor is it required to, maintain such tier. More specifically, the proposed rule change removes such tier, as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

In connection with the elimination of the Targeted Step-Up Tier, the Exchange also proposes to delete the definition of the term ''Targeted Step-Up Securities'' from the ''Definitions'' section of the Fee Schedule, as such term would no longer be used on the Fee Schedule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[34] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[35] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in

Schedule under the existing description ''Removed volume from MEMX Book, Liquidity Removal Tier 1'' with a Fee Code of ''R1'' assigned on the monthly invoices provided by the Exchange. The Exchange is not proposing to change the fee charged under Liquidity Removal Tier 1 for executions of securities priced below $1.00 per share.

[31] As set forth on the Fee Schedule, ''Step-Up ADAV'' means ADAV in the relevant baseline month subtracted from current ADAV.

[32] As set forth on the Fee Schedule, ''Targeted Step-Up Securities'' means a list of securities designated as such, the universe of which will be determined by the Exchange and published on the Exchange's website.

[33] *See* Securities Exchange Act Release No. 93554 (November 10, 2021), 86 FR 64248 (November 17, 2021) (SR–MEMX–2021–16) (notice of filing and immediate effectiveness of fee changes adopted by the Exchange, including the adoption of the Targeted Step-Up Tier).

[34] 15 U.S.C. 78f.

[35] 15 U.S.C. 78f(b)(4) and (5).

determining prices and SRO revenues and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [36]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional aggressively priced liquidity and more diverse types of order flow to the Exchange, which the Exchange believes would enhance liquidity and market quality on the Exchange to the benefit of all Members, as well as to decrease the Exchange's expenditures and generate additional revenue with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity.

The Exchange believes that the proposed NBBO Setter Tier is a reasonable means to encourage Members to not only increase their order flow to the Exchange but also to contribute to price discovery and market quality on the Exchange by submitting aggressively priced displayed liquidity. As noted above, the proposed NBBO Setter Tier is comparable to other volume-based incentives and discounts, which have been widely adopted by exchanges (including the Exchange) and are equitable and not unfairly discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes the proposed NBBO Setter Tier is equitable and not unfairly discriminatory for these same reasons, as it is available to all Members and is designed to incentivize the entry of aggressively priced displayed liquidity that will create tighter spreads, thereby promoting price discovery and market quality on the Exchange to the benefit of all Members and public investors. As such, the Exchange believes the additive rebate for executions of Setter Volume provided under the NBBO Setter Tier for qualifying Members is reasonably related to the market quality benefits that such tier is designed to promote. Additionally, as noted above, at least one other U.S. equity exchange has adopted a similar pricing incentive applicable to executions of orders that establish the NBBO.[37]

The Exchange believes that the proposed changes to reduce the standard rebates provided for executions of Added Non-Displayed Volume (*i.e.,* both Added Midpoint Volume and Added Non-Midpoint Hidden Volume) are reasonable because, as described above, such changes are designed to decrease the Exchange's expenditures with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity, and the proposed new standard rebates for executions of Added Midpoint Volume and Added Non-Midpoint Hidden Volume remain higher than, and competitive with, the standard rebates provided by other exchanges for executions of similar orders.[38] The Exchange also believes the proposed standard rebates for executions of Added Midpoint Volume and Added Non-Midpoint Hidden Volume are equitable and not unfairly discriminatory, as such standard rebates will apply equally to all Members.

The Exchange believes that the proposed Non-Display Add Tiers 1 and 2 are reasonable because such tiers would provide Members with an additional incentive to achieve certain volume thresholds on the Exchange and, in return, receive enhanced rebates for Added Non-Displayed Volume commensurate with the benefits of increased activity. The Exchange also believes that the proposed Non-Display Add Tiers 1 and 2 are reasonable, equitable, and not unfairly discriminatory for the same reasons applicable to other volume-based incentives and discounts described above, in that such tiers would be available to all Members and are designed to encourage Members to maintain or increase their order flow (particularly in the form of liquidity adding non-displayed orders) to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants. Further, the proposed new Non-Display Add Tiers 1 and 2 are reasonable as such tiers would provide Members with opportunities to qualify for enhanced rebates for executions of Added Non-Displayed Volume in a manner that provides increasingly higher benefits for satisfying increasingly more stringent criteria.

The Exchange also believes it is reasonable, equitable and not unfairly discriminatory to provide Members that qualify for Non-Display Add Tier 1 or Non-Display Add Tier 2 free executions of orders (including Midpoint Peg orders) in securities priced below $1.00 per share that add non-displayed liquidity to the Exchange, as this is the same as the standard pricing that is currently applicable to such executions for all Members.

The Exchange believes that the proposed change to modify the required criteria under Liquidity Provision Tier 3 is reasonable because, as noted above, such change would keep the existing ADAV threshold intact and also provide two additional alternative volume thresholds that a Member may choose to achieve that are based on different types of volume, which would incentivize the submission of different types of order flow, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members. The Exchange also believes the proposed new criteria are equitable and not unfairly discriminatory because all Members will continue to be eligible to meet such criteria, including the Members that currently meet the existing ADAV threshold that is not changing. Further, as noted above, while the Exchange has no way of predicting with certainty how the proposed new criteria will impact Member activity, the Exchange expects that more Members will be able to qualify for such tier under the proposed new criteria, which is more expansive.

The Exchange believes that the proposed reduced standard rebate provided for executions of Added Displayed Volume (*i.e.,* $0.0020 per share) is reasonable because the Exchange believes it represents only a modest decrease (*i.e.,* $0.0002 per share) from the current standard rebate provided for executions of Added Displayed Volume (*i.e.,* $0.0022 per share) and, as noted above, it remains in line with, or higher than, the standard rebates provided by other exchanges for

[36] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[37] *See supra* note 12.

[38] *See supra* notes 16–17.

executions of orders in securities priced at or above $1.00 per share that add displayed liquidity.[39]

Similarly, Exchange believes that the proposed reduced standard rebate provided for executions of Added Displayed Retail Volume (*i.e.,* $0.0035 per share) is reasonable because the Exchange believes it represents only a modest decrease (*i.e.,* $0.0002 per share) from the current standard rebate provided for executions of Added Displayed Retail Volume (*i.e.,* $0.0037 per share) and, as noted above, it remains higher than, and competitive with, the standard rebates provided by other exchanges for executions of attested retail orders in securities priced at or above $1.00 per share that add displayed liquidity.[40]

The Exchange also believes that the proposed increased standard fee charged for executions of Removed Volume (*i.e.,* $0.0030 per share) is reasonable because the Exchange believes it represents only a modest increase (*i.e.,* $0.0001 per share) from the current standard fee charged for executions of Removed Volume (*i.e.,* $0.0029 per share) and, as noted above, it remains in line with the standard fees charged by other exchanges for executions of orders in securities priced at or above $1.00 per share that remove liquidity.[41]

The Exchange believes the proposed changes to reduce the standard rebate for executions of Added Displayed Volume, reduce the standard rebate for executions of Added Displayed Retail Volume, and increase the standard fee for executions of Removed Volume are reasonable because, as noted above, the Exchange believes such changes would act together to decrease the Exchange's expenditures and generate additional revenue with respect to its transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added displayed liquidity. The Exchange also believes that the proposed changes to these standard rates represents an equitable allocation of fees and are not unfairly discriminatory because such standard rates will continue to apply equally to all Members.

The Exchange believes that the proposed increased fee charged for executions of Removed Volume under Liquidity Removal Tier 1 (*i.e.,* $0.00285 per share) is reasonable because the Exchange believes it represents only a modest increase (*i.e.,* $0.00005 per share) from the current fee charged for executions of Removed Volume under Liquidity Removal Tier 1 (*i.e.,* $0.0028 per share), and the Exchange is also proposing to lower both of the volume thresholds under such tier such that each threshold would be easier to achieve. Thus, while the Exchange is modestly increasing the fee under such tier, as noted above, it expects that more Members will strive to qualify for such tier due to the proposed lower criteria and, in turn, receive the corresponding discounted fee for executions of Removed Volume. The Exchange also believes this proposed change is reasonable, as it believes the proposed increased fee continues to be commensurate with the proposed lower criteria. The Exchange also believes the proposed increased fee and new criteria are equitable and not unfairly discriminatory because all Members will continue to be eligible to meet such criteria and qualify for Liquidity Removal Tier 1, and therefore, have the opportunity to pay a discounted fee for executions of Removed Volume.

The Exchange believes the proposed rule changes to eliminate the DLI Additive Rebate for DLI Tier 2 and the Targeted Step-Up Tier are reasonable because the Exchange is not required to maintain such incentives or provide Members any opportunities to receive additive rebates. The Exchange believes the proposal to eliminate such incentives is also equitable and not unfairly discriminatory because it applies equally to all Members (*i.e.,* the incentives will not be available for any Member). As noted above, neither of these incentives has achieved the level of participation the Exchange expected, and thus, such incentives are not accomplishing the goals that the Exchange had when initially adopting them. As the additional rebates offered under these incentives are not affecting Members' behavior in the manner originally conceived by the Exchange in that there are lower-than-expected levels of participation, the Exchange does not believe the proposed elimination of such incentives will have a significant impact on any Member's trading behavior on the Exchange. Furthermore, the proposed rule change to eliminate both the DLI Additive Rebate for DLI Tier 2 and the Targeted Step-Up Tier enables the Exchange to redirect resources and funding into other pricing incentives and tiers intended to incentivize increased order flow and enhance market quality for all Members.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act[42] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to decrease the Exchange's expenditures and generate additional revenue with respect to its transaction pricing, as well as to incentivize market participants to direct additional aggressively priced liquidity and more diverse types of order flow to the Exchange, thereby deepening liquidity and promoting market quality on the Exchange to the benefit of all market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''[43]

Intramarket Competition

As discussed above, the Exchange believes that the proposal would incentivize Members to submit additional aggressively priced displayed liquidity (including liquidity that establishes the NBBO) to the Exchange, and to maintain or increase their order flow on the Exchange generally, thereby contributing to a deeper and more liquid market and promoting price discovery and market quality on the Exchange to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market

[39] *See supra* note 25.

[40] *See supra* note 27.

[41] *See supra* note 29.

[42] 15 U.S.C. 78f(b)(4) and (5).

[43] *See supra* note 25.

participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for the proposed new NBBO Setter Tier and Non-Display Add Volume Tiers, and thus receive the proposed additive rebate for executions of Setter Volume or the proposed enhanced rebates for executions of Added Non-Displayed Volume, respectively, would be available to all Members that meet the associated volume requirements in any month. Similarly, as described above, Liquidity Provision Tier 3 and Liquidity Removal Tier 1 continue to be available to all Members that meet the associated volume criteria and, as noted above, the proposed new volume criteria under Liquidity Provision Tier 3 and Liquidity Removal Tier 1 include more expansive or lower volume thresholds, respectively, which the Exchange believes would enable more Members to possibly qualify for such tiers without impacting the ability of Members that currently qualify to continue to do so, and the Exchange believes the respective enhanced rebate and discounted fee provided under such tiers are reasonably related to the enhanced market quality that such tiers are designed to promote. Additionally, as noted above, the proposed reduced standard rebates for executions of Added Displayed Volume and Added Displayed Retail Volume, as well as the proposed increased standard fees for executions of Added Midpoint Volume, Add Non-Midpoint Hidden Volume and Removed Volume, would continue to apply equally to all Members in the same manner that such standard rates currently do today. Lastly, the Exchange does not believe the proposed changes to eliminate the DLI Additive Rebate for DLI Tier 2 and the Targeted Step-Up Tier will impose any burden on intramarket competition because such changes will apply to all Members uniformly, as in, such incentives will no longer be available to any Member, and, as described above, the Exchange does not believe the proposed elimination of such incentives will have a significant impact on any Member's trading behavior on the Exchange. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16.5% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to executions of Added Displayed Volume, Added Displayed Retail Volume, Added Midpoint Volume, Added Non-Midpoint Hidden Volume, Removed Volume, and Setter Volume, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed change is a competitive proposal through which the Exchange is seeking to decrease the Exchange's expenditures and generate additional revenue with respect to its transaction pricing and to encourage additional order flow to the Exchange through volume-based incentives and discounts, which have been widely adopted by exchanges, and standard pricing that is comparable to, and/or competitive with, pricing for similar executions in place at other exchanges.[44] Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar standard pricing for executions of Added Displayed Volume, Added Displayed Retail Volume, Added Midpoint Volume, Added Non-Midpoint Hidden Volume, and Removed Volume, as well as similar pricing incentives and discounts to market participants that achieve certain volume criteria and thresholds.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [45] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *SEC*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[46] Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [47] and Rule 19b–4(f)(2) [48] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

[44] *See supra* notes 12, 16, 17, 21, 25, 27 and 29.

[45] *See supra* note 36.

[46] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSE–2006–21)).

[47] 15 U.S.C. 78s(b)(3)(A)(ii).

[48] 17 CFR 240.19b–4(f)(2).

it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MEMX–2022–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MEMX–2022–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MEMX–2022–01 and should be submitted on or before April≤ 6, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[49]

Eduardo Aleman,

Assistant Secretary.

[FR Doc. 2022–05483 Filed 3–15–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–774, OMB Control No. 3235–0727]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Extension:

Rules 400–404 of Regulation Crowdfunding (Intermediaries)

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information provided for Rule 17Ab2–1 (17 CFR 240.17Ab2–1) and Form CA–1: Registration of Clearing Agencies (17 CFR 249b.200) under the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

The collections of information required under Rules 400 through 404 is mandatory for all funding portals. Form Funding Portal helps ensure that the Commission can make information about funding portals transparent and easily accessible to the investing public, including issuers and obligated persons who engage funding portals; investors who may purchase securities through offerings on funding portals; and other regulators. Further, the information provided on Form Funding Portal expands the amount of publicly available information about funding portals, including disciplinary history. Consequently, the rules and forms allows issuers and the investing public, as well as others, to become more fully informed about funding portals in a more efficient manner.

Rule 400 requires each person applying for registration with the Commission as a funding portal to file electronically with the Commission Form Funding Portal. Rule 400(a) requires a funding portal to become a member of a national securities association registered under Section 15A of the Exchange Act. Rule 400(b) requires a funding portal to file an amendment to Form Funding Portal if any information previously submitted on Form Funding Portal becomes inaccurate for any reason. Rule 400(c) provides that a funding portal can succeed to the business of a predecessor funding portal upon the successor filing a registration on Form Funding Portal and the predecessor filing a withdrawal on Form Funding Portal.

Rule 400(d) requires a funding portal to promptly file a withdrawal of registration on Form Funding Portal upon ceasing to operate as a funding portal. Rule 400(e) states that duplicate originals of the applications and reports provided for in this section must be filed with surveillance personnel designated by any registered national securities association of which the funding portal is a member. Rule 400(f) requires a nonresident funding portal to: (1) Obtain a written consent and power of attorney appointing an agent for service of process in the United States; (2) furnish the Commission with the name and address of its agent for services of process on Schedule C of Form Funding Portal; (3) certify that it can, as a matter of law, and will provide the Commission and any registered national securities association of which it becomes a member with prompt access to its books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and any registered national securities association of which it becomes a member; and (4) provide the Commission with an opinion of counsel and certify on Schedule C on Form Funding Portal that the firm can, as a matter of law, provide the Commission and registered national securities association of which it becomes a member with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission and any registered national securities association of which it becomes a member.[1]

[49] 17 CFR 200.30–3(a)(12).

[1] Exchange Act Section 3(h)(1)(C) permits us to impose, as part of our authority to exempt funding portals from broker registration, ''such other

Continued

Rule 403(a) requires a funding portal to implement written policies and procedures reasonably designed to achieve compliance with the federal securities laws and the rules and regulations thereunder relating to its business as a funding portal. Rule 403(b) provides that a funding portal must comply with privacy rules. Rule 404 requires all registered funding portals to maintain certain books and records relating to their funding portal activities, for not less than five years, the first two in an easily accessible place. Rule 404(e) requires funding portals to furnish promptly to the Commission, its representatives, and the registered national securities association of which the funding portal is a member true, correct, complete and current copies of such records of the funding portal that are requested by the representatives of the Commission and the registered national securities association.

The Commission staff estimates that annualized industry burden would be 36,775 hours to comply with Rules 400–404. The Commission staff estimates that the costs associated with complying with Rules 400–404 are estimated to be approximately a total amount of $671,793.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing by May 16, 2022.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

requirements under [the Exchange Act] as the Commission determines appropriate.''

Dated: March 11, 2022.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2022–05541 Filed 3–15–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94395; File No. SR–NYSEArca–2021–57]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the NYDIG Bitcoin ETF Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

March 10, 2022.

I. Introduction

On June 30, 2021, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the NYDIG Bitcoin ETF (''Trust'') under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on July 19, 2021.[3]

On August 23, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On September 29, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On January 4, 2022, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that NYSE Arca has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and in particular, the requirement that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.''[9]

When considering whether NYSE Arca's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard used in its orders considering previous proposals to list bitcoin[10]-based commodity trusts and bitcoin-based trust issued receipts.[11] As the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 92395 (July 13, 2021), 86 FR 38129 (July 19, 2021) (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nysearca-2021-57/srnysearca202157.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 92722 (Aug. 23, 2021), 86 FR 48268 (Aug. 27, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 93191, 86 FR 55090 (Oct. 5, 2021).

[8] *See* Securities Exchange Act Release No. 93893, 87 FR 1238 (Jan. 10, 2022).

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 86 FR at 38130.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order''); Order Disapproving a Proposed Rule Change to List and Trade Shares of the Valkyrie Bitcoin Fund under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR–NYSEArca–2021–31) (''Valkyrie Order''); Order Disapproving a Proposed Rule Change to List and Trade Shares of the Kryptoin Bitcoin ETF Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR–CboeBZX–2021–029) (''Kryptoin Order''); Order Disapproving a Proposed Rule Change to List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 94006 (Jan. 20, 2022), 87 FR 3869 (Jan. 25, 2022) (SR–NYSEArca–2021–37) (''SkyBridge Order''); and Order Disapproving a Proposed Rule Change to List and Trade Shares of the Wise Origin Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 94080 (Jan. 27 2022), 87 FR 5527 (Feb. 1, 2022) (SR–CboeBZX–2021–039) (''Wise Origin Order''). *See also* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and

Commission has explained, an exchange that lists bitcoin-based exchange-traded products (''ETPs'') can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[12]

The standard requires such surveillance-sharing agreements since they ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' [13] The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading the underlying assets for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[14] The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[15]

In the context of this standard, the terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[16] A surveillance-sharing agreement must be entered into with a ''significant market'' to assist in detecting and deterring manipulation of the ETP, because a person attempting to manipulate the ETP is reasonably likely to also engage in trading activity on that ''significant market.'' [17]

Consistent with this standard, for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (''ISG'') membership in common with, that market.[18] Moreover, the surveillance-sharing agreements have been consistently present whenever the Commission has approved the listing and trading of derivative securities, even where the underlying securities were also listed on national securities exchanges—such as options based on an index of stocks traded on a national securities exchange—and were thus subject to the Commission's direct regulatory authority.[19]

Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation.[20] In response, the Commission has agreed that, if a listing exchange could establish that the underlying market inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets, it would not necessarily need to enter into a surveillance-sharing agreement with a regulated significant market.[21] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.[22] No listing exchange has satisfied its burden to make such demonstration.[23]

Here, NYSE Arca contends that approval of the proposal is consistent with Section 6(b)(5) of the Exchange Act, in particular Section 6(b)(5)'s requirement that the rules of a national

---

Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca–2016–101) (''SolidX Order''). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019) (''VanEck Order'').

[12] *See* USBT Order, 85 FR at 12596. *See also* Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs); GraniteShares Order, 83 FR at 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

[13] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998) (''NDSP Adopting Release''). *See also* Winklevoss Order, 83 FR at 37594; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

[14] *See* NDSP Adopting Release, 63 FR at 70959.

[15] *See* Winklevoss Order, 83 FR at 37592–93; Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm.*

[16] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants. *See id.*

[17] *See* USBT Order, 85 FR at 12597.

[18] *See* Winklevoss Order, 83 FR at 37594.

[19] *See* USBT Order, 85 FR at 12597; Securities Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR–Amex–93–28) (order approving listing of options on American Depository Receipts (''ADRs'')). The Commission has also required a surveillance-sharing agreement in the context of index options even when (i) all of the underlying index component stocks were either registered with the Commission or exempt from registration under the Exchange Act; (ii) all of the underlying index component stocks traded in the U.S. either directly or as ADRs on a national securities exchange; and (iii) effective international ADR arbitrage alleviated concerns over the relatively smaller ADR trading volume, helped to ensure that ADR prices reflected the pricing on the home market, and helped to ensure more reliable price determinations for settlement purposes, due to the unique composition of the index and reliance on ADR prices. *See* Securities Exchange Act Release No. 26653 (Mar. 21, 1989), 54 FR 12705, 12708 (Mar. 28, 1989) (SR–Amex–87–25) (stating that ''surveillance-sharing agreements between the exchange on which the index option trades and the markets that trade the underlying securities are necessary'' and that ''[t]he exchange of surveillance data by the exchange trading a stock index option and the markets for the securities comprising the index is important to the detection and deterrence of intermarket manipulation.''). And the Commission has required a surveillance-sharing agreement even when approving options based on an index of stocks traded on a national securities exchange. *See* Securities Exchange Act Release No. 30830 (June 18, 1992), 57 FR 28221, 28224 (June 24, 1992) (SR–Amex–91–22) (stating that surveillance-sharing agreements ''ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses'').

[20] *See* USBT Order, 85 FR at 12597.

[21] *See* Winklevoss Order, 83 FR at 37580, 37582–91 (addressing assertions that ''bitcoin and bitcoin [spot] markets'' generally, as well as one bitcoin trading platform specifically, have unique resistance to fraud and manipulation); *see also* USBT Order, 85 FR at 12597.

[22] *See* USBT Order, 85 FR at 12597.

[23] *See supra* note 11.

securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.[24] As discussed in more detail below, NYSE Arca asserts that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the Exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size,[25] and because the manipulation concerns previously articulated by the Commission have been significantly mitigated.[26] In addition, NYSE Arca asserts that the proposal is consistent with Section 6(b)(5) of the Exchange Act because it is designed to protect investors and the public interest.[27]

In the analysis that follows, the Commission examines whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act by addressing: In Section III.B.1 assertions that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices; in Section III.B.2 assertions that NYSE Arca has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin; and in Section III.C assertions that the proposal is consistent with the protection of investors and the public interest.

Based on the analysis, the Commission concludes that NYSE Arca has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Commission further concludes that NYSE Arca has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin. As discussed further below, NYSE Arca repeats various assertions made in prior bitcoin-based ETP proposals that the Commission has previously addressed and rejected—and more importantly, NYSE Arca does not respond to the Commission's reasons for rejecting those assertions but merely repeats them. As a result, the Commission is unable to find that the proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).

The Commission again emphasizes that its disapproval of this proposed rule change does not rest on an evaluation of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. Rather, the Commission is disapproving this proposed rule change because, as discussed below, NYSE Arca has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5).

II. Description of the Proposed Rule Change

As described in more detail in the Notice,[28] the Exchange proposes to list and trade the Shares of the Trust under NYSE Arca Rule 8.201–E, which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.[29]

The investment objective of the Trust is to reflect the performance of the price of bitcoin less the expenses of the Trust's operations.[30] The Trust will not seek to reflect the performance of any benchmark or index. In seeking to achieve its investment objective, the Trust will only hold bitcoin.[31] The Trust will value its assets daily in accordance with Generally Accepted Accounting Principles (''GAAP''), which generally value bitcoin by reference to orderly transactions in the principal active market for bitcoin.[32] The Trust generally does not intend to hold cash or cash equivalents. However, the Trust may hold cash and cash equivalents on a temporary basis to pay extraordinary expenses.[33]

The net asset value (''NAV'') of the Trust will be determined in accordance with GAAP as the total value of bitcoin held by the Trust, plus any cash or other assets, less any liabilities including accrued but unpaid expenses.[34] According to the Exchange, generally, GAAP requires the fair value of an asset that is traded on a market to be measured by reference to orderly transactions on an active market. Among all active markets with orderly transactions, the market that is used to determine the fair value of an asset is the principal market. The Sponsor expects that the principal market will initially generally be the NYDFS-regulated trading venue with the highest trading volume and level of activity.[35] The NAV of the Trust will typically be determined as of 4:00 p.m. E.T. on each day that the Exchange is open for regular trading (''Business Day''). The Trust's daily activities will generally not be reflected in the NAV determined for the Business Day on which the transactions are effected (the trade date), but rather on the following Business Day. The NAV for the Trust's Shares will be disseminated daily to all market participants at the same time.[36]

The Trust will disseminate an intraday indicative value (''IIV'') per Share updated every 15 seconds during the Exchange's Core Trading Session (between 9:30 a.m. and 4:00 p.m. E.T.). The IIV will be calculated by using the same methodology that the Trust uses to determine NAV, which is to follow GAAP.[37]

The Trust will create and redeem Shares from time to time in ''in-kind'' transactions in blocks of 10,000 Shares (''Creation Baskets'').[38] Creation Baskets will only be made in exchange for delivery to the Trust or the distribution by the Trust of the amount of bitcoin represented by the Shares being created or redeemed, the amount of which will be based on the quantity of bitcoin attributable to each Share of the Trust (net of accrued but unpaid Sponsor fees, extraordinary expenses, or liabilities) being created or redeemed determined as of 4:00 p.m. E.T. on the day the order is properly received.[39]

III. Discussion

A. The Applicable Standard for Review

The Commission must consider whether NYSE Arca's proposal is consistent with the Exchange Act. Section 6(b)(5) of the Exchange Act requires, in relevant part, that the rules of a national securities exchange be

[24] *See* Notice, 86 FR at 38134.

[25] *See id.* at 38134–35.

[26] *See id.*

[27] *See id.* at 38134, 38136.

[28] *See* Notice, *supra* note 3. *See also* draft Registration Statement on Form S–1, dated February 16, 2021, filed by the Trust with the Commission (''Registration Statement''). The Registration Statement is not yet effective.

[29] Although the name of the Trust is the NYDIG Bitcoin ETF, the Trust is a commodity-based ETP. The Trust is not an exchange-traded fund, *i.e.,* an ''ETF,'' registered under the Investment Company Act of 1940, as amended (''1940 Act''), and is not subject to regulation under the 1940 Act.

[30] *See* Notice, 86 FR at 38129. NYDIG Asset Management LLC (''Sponsor'') is the sponsor of the Trust. Delaware Trust Company is the trustee of the Trust, U.S. Bancorp Fund Services, LLC (''Administrator'') is the transfer agent and the administrator of the Trust, and NYDIG Trust Company LLC (''Bitcoin Custodian'') is the bitcoin custodian for the Trust. The Bitcoin Custodian is chartered as a limited purpose trust company by the New York State Department of Financial Services (''NYDFS'') and is authorized by NYDFS to provide digital asset custody services. Both the Sponsor and the Bitcoin Custodian are indirect wholly-owned subsidiaries of New York Digital Investment Group LLC. *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.* at 38130. The Trust will enter into a cash custody agreement with U.S. Bank N.A. under which U.S. Bank N.A. will act as custodian of the Trust's cash and cash equivalents. *See id.*

[34] *See id.* at 38131.

[35] *See id.* at 38132.

[36] *See id.* at 38131–32.

[37] *See id.* at 38132.

[38] *See id.* at 38129–30.

[39] *See id.* at 38129–30, 38132.

designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [40] Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [41]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[42] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[43] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[44]

B. Whether NYSE Arca Has Met Its Burden To Demonstrate That the Proposal Is Designed To Prevent Fraudulent and Manipulative Acts and Practices

(1) Assertions That Other Means Besides Surveillance-Sharing Agreements Will Be Sufficient To Prevent Fraudulent and Manipulative Acts and Practices

As stated above, the Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with a comprehensive surveillance-sharing agreement with a regulated market of significant size, including by demonstrating that the bitcoin market as a whole or the relevant underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation.[45] Such resistance to fraud and manipulation must be novel and beyond those protections that exist in traditional commodities or securities markets.[46]

NYSE Arca asserts that ''on the whole, the manipulation concerns previously articulated by the Commission have since been significantly mitigated, and do not exceed those that exist in the markets for other commodities that underly [sic] securities listed on U.S. national securities exchanges.'' [47] Specifically, the Exchange asserts that the ''significant increase in trading volume and open interest in the bitcoin futures market, growth of liquidity in the spot market for bitcoin, and certain features of the Shares mitigate the manipulation concerns expressed by the Commission when it last reviewed exchange proposals to list a bitcoin exchange-traded product.'' [48]

NYSE Arca asserts that both the market for NYDFS-licensed bitcoin trading and the market for the trading of bitcoin futures and options on platforms regulated by the Commodity Futures Trading Commission (''CFTC'') have developed substantially.[49] According to NYSE Arca, in the three months ending on April 30, 2021:

- With respect to the bitcoin spot market, six NYDFS-licensed entities operated trading platforms with order books for spot trading of bitcoin, with a total average daily trading volume of approximately $2.5 billion; across these platforms, the average daily deviation of prices was less than 0.08%; and the largest NYDFS-licensed trading platform by volume had an average bid-ask spread during the period of less than 0.05% for trades of $250,000; and
- with respect to the bitcoin derivatives markets, two CFTC-regulated exchanges facilitated trading of bitcoin futures, with a total average daily trading volume of approximately $2.9 billion; and one CFTC-regulated exchange facilitated trading of options on bitcoin futures, with average monthly trading volume of approximately $380 million.[50]

According to NYSE Arca, the average daily trading volume for bitcoin across the three largest NYDFS-licensed platforms was approximately $7.95 million in 2016, $215.44 million in 2017, $267.19 million in 2018, $216.97 million in 2019, $708.39 million in 2020, and $2.56 billion in 2021 through April 30, 2021.[51] In addition, the Exchange states that the average daily trading volume and average daily open interest (*i.e.,* the average total bitcoin exposure of futures contracts held by market participants at the end of each trading day) for bitcoin futures contracts on the Chicago Mercantile Exchange (''CME'') and the Intercontinental Exchange (''ICE'') was approximately $41.10 million and $81.87 million, respectively, in 2016; $86.68 million and $126.90 million, respectively, in 2017; $172.60 million and $246.62 million, respectively, in 2018; $561.78 million and $535.13 million, respectively, in 2020, and $2.51 billion and $2.94 billion, respectively in 2021 through April 30, 2021.[52]

In addition, the Exchange asserts that ''increases in investor participation in and institutional adoption of bitcoin have facilitated the maturation of the bitcoin trading ecosystem'' such that manipulation concerns have been largely mitigated.[53]

[40] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that ''[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78f(b)(5).

[41] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[42] *See id.*

[43] *See id.*

[44] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 447 (D.C. Cir. 2017) (''Susquehanna'').

[45] *See* USBT Order, 85 FR at 12597 n.23. The Commission is not applying a ''cannot be manipulated'' standard. Instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *See id.*

[46] *See id.* at 12597.

[47] *See* Notice, 86 FR at 38134.

[48] *See id.*

[49] *See id.* at 38131.

[50] *See id.*

[51] *See id.* The bitcoin data is for trading volumes of bitcoin against U.S. dollars and excludes trading transactions of bitcoin against other digital assets (*e.g.,* Tether) or other fiat currencies (*e.g.,* euros). *See id.*

[52] *See id.*

[53] *See id.* at 38135. NYSE Arca also states that, ''[b]eginning in 2016, more institutional investors entered the bitcoin market.'' As a result, according to the Exchange, ''an increasing number of transactions have occurred in over-the-counter (''OTC'') markets instead of exchanges. This type of trading allows for bespoke trading arrangements that may ease the burden of trade operations or reduce direct types of risks (*e.g.,* counterparty risk).'' *See id.* at 38131.

NYSE Arca also asserts that ''[b]ecause the Shares can only be created or redeemed in kind, and . . . because the Sponsor fee is accrued with respect to the quantity of bitcoin held by the Trust and paid in kind by the Trust, the Trust receives and holds only bitcoin.'' [54] According to the Exchange, ''[t]his substantially reduces the potential for manipulation of the number of Shares created or redeemed, which therefore substantially reduces the potential for shareholders to be harmed by manipulation.'' [55]

Based on assertions made and the information provided, the Commission can find no basis to conclude that NYSE Arca has articulated other means to prevent fraud and manipulation that are sufficient to justify dispensing with the requisite surveillance-sharing agreement.

The Exchange's assertions about the maturation and growth of the bitcoin market do not constitute other means to prevent fraud and manipulation sufficient to justify dispensing with the requisite surveillance-sharing agreement. While the Exchange states that the maturation of the bitcoin market mitigates against the Commission's concerns about fraud and manipulation,[56] such assertion is general and conclusory, and NYSE Arca provides no analysis or evidence for how such maturation serves to detect and deter potential fraud and manipulation. As stated above, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[57]

While NYSE Arca provides data regarding the size of the bitcoin spot and derivatives markets, such information is not sufficient to support the finding that other means besides surveillance-sharing agreements exist to prevent fraud or manipulation. NYSE Arca, for example, does not provide meaningful analysis pertaining to how these figures compare to other markets or why one must conclude, based on the numbers provided, that the concerns previously articulated by the Commission relating to fraud and manipulation of the bitcoin market have been mitigated. Further, although the Exchange states that an increase in OTC transactions in the bitcoin spot market due to an increase in institutional investor participation in that market reduces risks,[58] apart from counterparty risk, the Exchange does not elaborate on what those risks are or how or why any such risks would be reduced or how or why such reduction of risks, including counterparty risk, would mitigate against fraud and manipulation.

Moreover, while NYSE Arca asserts that the markets for NYDFS-licensed spot bitcoin trading have developed substantially,[59] the level of regulation on the bitcoin spot platforms, including NYDFS-licensed platforms, is not commensurate to the obligations, authority, and oversight of national securities exchanges or futures exchanges. National securities exchanges are required to have rules that are ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [60] Moreover, national securities exchanges must file proposed rules with the Commission regarding certain material aspects of their operations,[61] and the Commission has the authority to disapprove any such rule that is not consistent with the requirements of the Exchange Act.[62] Thus, national securities exchanges are subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.[63] NYDFS regulation therefore is not a substitute for the Commission's regulation of the national securities exchanges.[64]

In addition, while the Commission recognizes that the CFTC maintains some jurisdiction over the bitcoin spot market, under the Commodity Exchange Act, the CFTC does not have regulatory authority over bitcoin spot trading platforms.[65] Except in certain limited circumstances, bitcoin spot trading platforms are not required to register with the CFTC, and the CFTC does not set standards for, approve the rules of, examine, or otherwise regulate bitcoin spot markets.[66] As the CFTC itself stated, while the CFTC ''has an important role to play,'' U.S. law ''does not provide for direct, comprehensive Federal oversight of underlying Bitcoin or virtual currency spot markets.'' [67] In addition, while certain bitcoin derivatives exchanges that trade bitcoin futures and options on bitcoin futures are regulated by the CFTC, the CFTC's

[54] *See id.* at 38135.

[55] *See id.*

[56] *See supra* notes 47, 48, and 53 and accompanying text. The Exchange does not directly tie the asserted maturation of the bitcoin market to an argument that such market evolution provides sufficient means to justify dispensing with the requisite surveillance sharing agreement.

[57] *See supra* note 44. The Commission has previously considered and rejected similar arguments about the maturation of the bitcoin market. *See, e.g.,* Valkyrie Order, 86 FR at 74159.

[58] *See supra* note 53 and accompanying text.

[59] *See supra* note 49 and accompanying text.

[60] *See* 15 U.S.C. 78f(b)(5)

[61] 17 CFR 240.19b–4(a)(6)(i).

[62] Section 6 of the Exchange Act, 15 U.S.C. 78f, requires national securities exchanges to register with the Commission and requires an exchange's registration to be approved by the Commission, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), requires national securities exchanges to file proposed rules changes with the Commission and provides the Commission with the authority to disapprove proposed rule changes that are not consistent with the Exchange Act. Designated contract markets (''DCMs'') (commonly called ''futures markets'') registered with and regulated by the Commodity Futures Trading Commission (''CFTC'') must comply with, among other things, a similarly comprehensive range of regulatory principles and must file rule changes with the CFTC. *See, e.g.,* Designated Contract Markets (DCMs), CFTC, *available at http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.*

[63] *See* Winklevoss Order, 83 FR at 37597. The Commission notes that the NYDFS has issued ''guidance'' to supervised virtual currency business entities, stating that these entities must ''implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing.'' *See* Maria T. Vullo, Superintendent of Financial Services, NYDFS, *Guidance on Prevention of Market Manipulation and Other Wrongful Activity* (Feb. 7, 2018), *available at https://www.dfs.ny.gov/docs/legal/industry/il180207.pdf.* The NYDFS recognizes that it's ''guidance is not intended to limit the scope or applicability of any law or regulation'' (*id.*), which would include the Exchange Act. Nothing in the record evidences whether the bitcoin spot markets the Exchange is referring to have complied with this NYDFS guidance.

Further, there are substantial differences between the NYDFS and the Commission's regulation. Anti-Money Laundering (''AML'') and Know-Your-Customer (''KYC'') policies and procedures, for example, have been referenced in other bitcoin-based ETP proposals as a purportedly alternative means by which such ETPs would be uniquely resistant to manipulation. The Commission has previously concluded that such AML and KYC policies and procedures do not serve as a substitute for, and are not otherwise dispositive in the analysis regarding the importance of, having a surveillance sharing agreement with a regulated market of significant size relating to bitcoin. For example, AML and KYC policies and procedures do not substitute for the sharing of information about market trading activity or clearing activity and do not substitute for regulation of a national securities exchange. *See* USBT Order, 85 FR at 12603 n.101.

[64] *See, e.g.,* USBT Order, 85 FR at 12603–05; VanEck Order, 86 FR at 64545; Kryptoin Order, 86 FR at 74173.

[65] *See* USBT Order, 85 FR at 12604; WisdomTree Order, 86 FR at 69328; Valkyrie Order, 86 FR at 74162; SkyBridge Order, 87 FR at 3877.

[66] *See id.*

[67] *See* Winklevoss Order, 83 FR at 37599 n.288 (quoting CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets (Jan. 4, 2018), at 1, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf*).

regulations do not extend to the bitcoin spot platforms. And, with respect to NYSE Arca's statements about the growth of the bitcoin derivatives markets,[68] although the Exchange claims that the CFTC-regulated bitcoin derivative markets have developed substantially, the Exchange has not explained why such development mitigates against the Commission's concerns about fraud and manipulation such that it would not be necessary for the Exchange to enter into a surveillance-sharing agreement with a regulated market of significant size.[69]

Moreover, NYSE Arca does not sufficiently contest the presence of possible sources of fraud and manipulation in the bitcoin spot market generally that the Commission has raised in previous orders, which have included (1) ''wash'' trading, (2) persons with a dominant position in bitcoin manipulating bitcoin pricing, (3) hacking of the bitcoin network and trading platforms, (4) malicious control of the bitcoin network, (5) trading based on material, non-public information (such as plans of market participants to significantly increase or decrease their holdings in bitcoin; new sources of demand for bitcoin; the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain), or trading based on the dissemination of false and misleading information, (6) manipulative activity involving the purported ''stablecoin'' Tether (USDT), and (7) fraud and manipulation at bitcoin trading platforms.[70]

In addition, NYSE Arca does not address risk factors specific to the bitcoin blockchain and bitcoin platforms, described in the Trust's Registration Statement, that undermine the argument that the concerns previously articulated by the Commission relating to fraud and manipulation of the bitcoin market have been mitigated.[71] For example, the Registration Statement acknowledges that the ''venues through which bitcoin trades are relatively new and may be more exposed to operational problems or failure than trading venues for other assets''; that ''[o]ver the past several years, a number of bitcoin exchanges have been closed due to fraud, failure or security breaches''; that the bitcoin blockchain could be vulnerable to a ''51% attack,'' in which a bad actor (or actors) or botnet that controls a majority of the processing power of the bitcoin network may be able to alter the bitcoin blockchain on which the bitcoin network and bitcoin transactions rely; and that ''[r]ecently, some digital asset networks have been subject to malicious activity achieved through control over 50% of the processing power on the network.'' [72]

Finally, the Commission finds that NYSE Arca has not demonstrated that in-kind creations and redemptions provide the Shares with a unique resistance to manipulation. The Commission has previously addressed similar assertions.[73] As the Commission stated before, in-kind creations and redemptions are a common feature of ETPs, and the Commission has not previously relied on the in-kind creation and redemption mechanism as a basis for excusing exchanges that list ETPs from entering into surveillance-sharing agreements with significant, regulated markets related to the portfolio's assets.[74] Accordingly, the Commission is not persuaded here that the Trust's in-kind creations and redemptions afford it a unique resistance to manipulation.

(2) Assertions That NYSE Arca Has Entered Into a Comprehensive Surveillance-Sharing Agreement With a Regulated Market of Significant Size

As NYSE Arca has not demonstrated that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, the Commission next examines whether the record supports the conclusion that NYSE Arca has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size relating to the underlying assets. In this context, the term ''market of significant size'' includes a market (or group of markets) as to which (i) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (ii) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[75]

As the Commission has stated in the past, it considers two markets that are members of the ISG to have a comprehensive surveillance-sharing agreement with one another, even if they do not have a separate bilateral surveillance-sharing agreement.[76] Accordingly, based on the common membership of NYSE Arca and the CME in the ISG,[77] NYSE Arca has the equivalent of a comprehensive surveillance-sharing agreement with CME. However, while the Commission recognizes that the CFTC regulates the CME futures market,[78] including the CME bitcoin futures market, and thus such market is ''regulated,'' in the context of the proposed ETP, the record does not, as explained further below, establish that the CME bitcoin futures market is a ''market of significant size'' as that term is used in the context of the applicable standard here.

(a) Whether There Is a Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on the CME Bitcoin Futures Market To Successfully Manipulate the ETP

The first prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that there is a reasonable likelihood that a person attempting to manipulate the ETP would have to trade on the CME bitcoin futures market to successfully manipulate the ETP.

As discussed above, NYSE Arca states that the market for trading of bitcoin futures has developed substantially [79] and argues that ''[t]he significant growth in trading volumes, open interest, large open interest holders, and total market participants in the bitcoin futures market since the [USBT Order] was issued is reflective of that market's

[68] *See supra* notes 49–50 and accompanying text.

[69] As discussed herein, the information in the record does not establish that the CME bitcoin futures market is a ''market of significant size'' related to bitcoin. *See infra* Section III.B.2.

[70] *See* USBT Order, 85 FR at 12600–01 & nn.66–67 (discussing J. Griffin & A. Shams, *Is Bitcoin Really Untethered?* (October 28, 2019), *available at https://ssrn.com/abstract=3195066* and published in 75 J. Finance 1913 (2020)); Winklevoss Order, 83 FR at 37585–86; Valkyrie Order, 86 FR at 74160; SkyBridge Order, 87 FR at 3872.

[71] *See, e.g.,* SkyBridge Order, 87 FR at 3873.

[72] *See* Registration Statement at 14–15, 21.

[73] *See* Winklevoss Order, 83 FR at 37589–90; USBT Order, 85 FR at 12607–08; VanEck Order, 86 FR at 64546; WisdomTree Order, 86 FR at 69329; Kryptoin Order, 86 FR at 74174; SkyBridge Order, 87 FR at 3874; Wise Origin Order, 87 FR at 5533.

[74] *See, e.g.,* iShares COMEX Gold Trust, Securities Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14969, 14974 (Mar. 24, 2006) (SR–Amex–2005–072).

[75] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that provides guidance to market participants. *See id.*

[76] *See id.* at 37580 n.19.

[77] *See* Notice, 86 FR at 38135.

[78] While the Commission recognizes that the CFTC regulates the CME, the CFTC is not responsible for direct, comprehensive regulation of the underlying bitcoin spot market. *See* Winklevoss Order, 83 FR at 37587, 37599. *See also supra* notes 65–67 and accompanying text.

[79] *See supra* notes 49–52 and accompanying text.

growing influence on the spot price of bitcoin.'' [80]

NYSE Arca further states that some academic research ''suggests that the bitcoin futures market has been leading bitcoin spot market price discovery since as early as 2018.'' [81] NYSE Arca also states that the Sponsor has developed ''more recent proprietary research, including lead-lag analyses, that demonstrates that prices in the CME bitcoin futures market do indeed lead prices in the bitcoin spot market, including non-U.S. bitcoin spot markets.'' [82] NYSE Arca asserts that the Sponsor's finding ''supports the thesis that a market participant attempting to manipulate the Shares would have to trade on that market to manipulate the ETP.'' [83]

NYSE Arca also states that the Sponsor's research ''shows that the bitcoin futures market is one of the primary venues that market participants use to transact large exposures to bitcoin.'' [84] According to the Exchange, this ''can be attributed to multiple factors, such as institutional familiarity with futures margining and settlement processes, the simplicity of cash settlement instead of physical settlement in a novel asset, and the efficient leverage offered by exchange margining.'' [85]

The Exchange states that, ''[i]n contrast to the efficient leverage offered through the futures market, many bitcoin spot trading venues require full pre-funding of trading, which means it would be highly capital intensive to 'spoof' or 'layer' order books on spot trading venues.'' [86] According to the Exchange, this ''further supports [the Sponsor's] conclusion that if a market participant intended to manipulate the price of bitcoin, and thereby the Shares, the bitcoin futures market is the one that would be manipulated first.[87]

The record does not demonstrate that there is a reasonable likelihood that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate it. NYSE Arca's assertions about the general upward trends in trading volume and open interest of, and in the number of large open interest holders and number of unique accounts trading in, bitcoin futures do not establish that the CME bitcoin futures market is a market of significant size.[88] While NYSE Arca provides data showing absolute growth in the size of the CME and ICE bitcoin futures markets, it provides no data relative to the concomitant growth in either the bitcoin spot markets or other bitcoin futures markets (including unregulated futures markets). Moreover, even if the CME has grown in relative size, as the Commission has previously articulated, the interpretation of the term ''market of significant size'' or ''significant market'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[89] Accordingly, NYSE Arca's recitation of data reflecting the size of two bitcoin futures market, either currently or in relation to previous years, is not sufficient to establish an interrelationship between the CME bitcoin futures market and the proposed ETP.[90]

Further, the econometric evidence in the record for this proposal also does not support the conclusion that an interrelationship exists between the CME bitcoin futures market and the bitcoin spot market such that it is reasonably likely that a person attempting to manipulate the proposed ETP would also have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP.[91] While NYSE Arca states that CME bitcoin futures pricing has been leading bitcoin spot market price discovery since 2018,[92] it relies on the findings of a price discovery analysis in one section of a single academic paper to support the overall thesis.[93] However, the findings of that paper's Granger causality analysis, which is widely used to formally test for lead-lag relationships, are concededly mixed.[94] In addition, the Commission considered an unpublished version of the paper in the USBT Order, as well as a comment letter submitted by the authors on that record.[95] In the USBT Order, as part of the Commission's conclusion that ''mixed results'' in academic studies failed to demonstrate that the CME bitcoin futures market constitutes a market of significant size, the Commission noted the paper's inconclusive evidence that CME bitcoin futures prices lead spot prices—in particular that the months at the end of the paper's sample period showed that the spot market was the leading market—and stated that the record did not include evidence to explain why this would not indicate a shift towards prices in the spot market leading the futures market that would be expected to persist into the future.[96] The Commission also stated that the paper's use of daily price data, as opposed to intraday prices, may not be able to distinguish which market incorporates new information faster.[97] NYSE Arca has not addressed either issue here.[98]

Moreover, while NYSE Arca asserts that the Sponsor has conducted proprietary research, including lead-lag analyses, to demonstrate that the CME bitcoin futures market prices lead the bitcoin spot market, the Exchange does not provide any information relating to its proprietary research, including any

[80] *See* Notice, 86 FR at 38135.

[81] *See id.* at 38135 & n.18 (citing Y. Hu, Y. Hou & L. Oxley, *What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective,* 72 Int'l Rev. of Fin. Analysis 101569 (2020) (*available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*) (''Hu, Hou & Oxley'')).

[82] *See* Notice, 86 FR at 38135.

[83] *See id.*

[84] *Id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See also supra* note 69 and accompanying text.

[89] *See* USBT Order, 85 FR at 12611.

[90] *See id.* at 12612. The Commission has previously considered and rejected similar arguments. *See* VanEck Order, 86 FR at 64547; Kryptoin Order, 86 FR 74175–76; SkyBridge Order, 87 FR 3875–76; Wise Origin Order, 87 FR at 5534–35. Moreover, it is unclear how the data provided by the Exchange supports the assertion that the CME is a market of significant size, as it appears to be aggregate data for bitcoin futures contracts trading on both the CME and the ICE. *See supra* note 52 and accompanying text.

[91] *See* USBT Order, 85 FR at 12611. Listing exchanges have attempted to demonstrate such an ''interrelationship'' by presenting the results of various econometric ''lead-lag'' analyses. The Commission considers such analyses to be central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the CME bitcoin futures market. *See id.* at 12612. *See also* VanEck Order, 86 FR at 64547; WisdomTree Order, 86 FR 69330–31; Kryptoin Order, 86 FR 74176; SkyBridge Order, 87 FR at 3876; Wise Origin Order, 87 FR at 5535.

[92] *See* Notice, 86 FR at 38135.

[93] *See supra* note 81 and accompanying text. NYSE Arca references the following conclusion from the ''time-varying price discovery'' section of Hu, Hou & Oxley: ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective . . .'' *See* Notice, 86 FR at 38135 n.18.

[94] The paper finds that the CME bitcoin futures market dominates the spot markets in terms of Granger causality, but that the causal relationship is bi-directional, and a Granger causality episode from March 2019 to June/July 2019 runs from bitcoin spot prices to CME bitcoin futures prices. The paper concludes: ''[T]he Granger causality episodes are not constant throughout the whole sample period. Via our causality detection methods, market participants can identify when markets are being led by futures prices and when they might not be.'' *See* Hu, Hou & Oxley, *supra* note 81.

[95] *See* USBT Order, 85 FR at 12609.

[96] *See id.* at 12613 n.244.

[97] *See id.*

[98] *See* VanEck Order, 86 FR at 64547; WisdomTree Order, 86 FR at 69331; Kryptoin Order, 86 FR 74176; Wise Origin Order, 87 FR 5535.

assumptions, parameters, or methodologies used, or furnish any data or analysis to support such a conclusion. Accordingly, the Exchange's unsupported representations constitute an insufficient basis for approving a proposed rule change in circumstances where, as here, the Exchange's assertion would form such an integral role in the Commission's analysis and the assertion is subject to several challenges.[99] In this context, NYSE Arca's reliance on a single paper, whose own lead-lag results are inconclusive, and its own proprietary research that it has not provided is especially lacking because the academic literature on the lead-lag relationship and price discovery between bitcoin spot and futures markets is unsettled.[100] In the USBT Order, the Commission responded to multiple academic papers that were cited and concluded that, in light of the mixed results found, the exchange there had not demonstrated that it is reasonably likely that a would-be manipulator of the proposed ETP would transact on the CME bitcoin futures market.[101] Likewise, here, given the body of academic literature to indicate to the contrary, the Commission concludes that the information that NYSE Arca provides is not a sufficient basis to support a determination that it is reasonably likely that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market.[102]

The Exchange also asserts that the Sponsor's research shows that the bitcoin futures market is one of the primary venues that market participants use to transact large exposures to bitcoin.[103] However, as previously mentioned, NYSE Arca does not provide information relating to the Sponsor's research or furnish any data or analysis to support these conclusions. Nor does the Exchange explain the significance of its assertion in the overall analysis of whether there is a reasonable likelihood that a person attempting to manipulate the ETP would have to trade on the *CME* bitcoin futures market to successfully manipulate the ETP, as opposed to other bitcoin futures markets.

The Exchange further asserts that the efficient leverage offered through the futures market in contrast to the spot market, where it would be highly capital intensive to ''spoof'' or ''layer'' order books on spot trading venues, supports the conclusion that that would-be manipulators of bitcoin prices would attempt to do so in the bitcoin futures market.[104] Again, the Exchange does not provide any additional data or analysis to support its conclusions or any examples that would demonstrate that such assertion is reasonable, especially as it relates to the CME. In other words, even assuming that the Commission concurred with the Exchange's premise that it is reasonably likely that a would-be manipulator would attempt to manipulate the ETP by trading on the bitcoin futures market, the Exchange does not explain why such manipulator would do so specifically on the CME bitcoin futures market. Furthermore, the NYSE Arca does not provide any information on the actual leverage provided by trading CME futures contracts versus unregulated bitcoin futures markets or why would-be manipulators would be likely to trade on the CME rather than other bitcoin futures platforms that may have lower margin requirements.[105]

The Commission accordingly concludes that the information provided in the record for this proposal does not establish a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP. Therefore, the information in the record also does not establish that the CME bitcoin futures market is a ''market of significant size'' with respect to the proposed ETP.

(b) Whether It Is Unlikely That Trading in the Proposed ETP Would Be the Predominant Influence on Prices in the CME Bitcoin Futures Market

The second prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.[106]

NYSE Arca asserts that trading in the Shares would not be the predominant force on prices in the bitcoin futures market (or spot market) because of the significant volume in the bitcoin futures market (in excess of $2.5 billion in average daily volume as of April 30, 2021), the size of bitcoin's market capitalization (in excess of $1 trillion as of April 30, 2021), and the significant liquidity available in the spot market (in excess of $2.5 billion in average daily volume as of April 30, 2021).[107]

In addition, NYSE Arca states that, based on the Sponsor's analysis, considering a small subset of spot bitcoin trading platforms, the cost to buy or sell $5 million worth of bitcoin and $10 million worth of bitcoin averages roughly 20 basis points and 40

[99] *See Susquehanna,* 866 F.3d at 447.

[100] *See, e.g.,* D. Baur & T. Dimpfl, *Price discovery in bitcoin spot or futures?,* 39 J. Futures Mkts. 803 (2019) (finding that the bitcoin spot market leads price discovery); O. Entrop, B. Frijns & M. Seruset, *The determinants of price discovery on bitcoin markets,* 40 J. Futures Mkts. 816 (2020) (finding that price discovery measures vary significantly over time without one market being clearly dominant over the other); J. Hung, H. Liu & J. Yang, *Trading activity and price discovery in Bitcoin futures markets,* 62 J. Empirical Finance 107 (2021) (finding that the bitcoin spot market dominates price discovery); B. Kapar & J. Olmo, *An analysis of price discovery between Bitcoin futures and spot markets,* 174 Econ. Letters 62 (2019) (finding that bitcoin futures dominate price discovery); E. Akyildirim, S. Corbet, P. Katsiampa, N. Kellard & A. Sensoy, *The development of Bitcoin futures: Exploring the interactions between cryptocurrency derivatives,* 34 Fin. Res. Letters 101234 (2020) (finding that bitcoin futures dominate price discovery); A. Fassas, S. Papadamou, & A. Koulis, *Price discovery in bitcoin futures,* 52 Res. Int'l Bus. Fin. 101116 (2020) (finding that bitcoin futures play a more important role in price discovery) (''Fassas et al''); S. Aleti & B. Mizrach, *Bitcoin spot and futures market microstructure,* 41 J. Futures Mkts. 194 (2021) (finding that relatively more price discovery occurs on the CME as compared to four spot exchanges); J. Wu, K. Xu, X. Zheng & J. Chen, *Fractional cointegration in bitcoin spot and futures markets,* 41 J. Futures Mkts. 1478 (2021) (finding that CME bitcoin futures dominate price discovery). *See also* C. Alexander & D. Heck, *Price discovery in Bitcoin: The impact of unregulated markets,* 50 J. Financial Stability 100776 (2020) (finding that, in a multi-dimensional setting, including the main price leaders within futures, perpetuals, and spot markets, CME bitcoin futures have a very minor effect on price discovery; and that faster speed of adjustment and information absorption occurs on the unregulated spot and derivatives platforms than on CME bitcoin futures).

[101] *See* USBT Order, 85 FR at 12613 nn.239–244 and accompanying text.

[102] In addition, the Exchange fails to address the relationship (if any) between prices on other bitcoin futures markets and the CME bitcoin futures market and/or the bitcoin spot market, or where price formation occurs when the entirety of bitcoin futures markets, not just CME, is considered. *See* VanEck Order, 86 FR at 64547–8; WisdomTree Order, 86 FR at 69331; Kryptoin Order, 86 FR 74176; Wise Origin Order, 87 FR 5535.

[103] *See id.*

[104] *See* Notice, 86 FR at 38135.

[105] For example, CME bitcoin futures currently have a 50% margin requirement. *See https://www.cmegroup.com/markets/cryptocurrencies/bitcoin/bitcoin.margins.html* (last visited December 1, 2021). On the other hand, the contract specifications for bitcoin futures contracts on BitMex, Deribit, and Binance specify initial margin requirements of 1%, 1%, and 2%, respectively. *See https://www.bitmex.com/app/contract/XBTUSD* (last visited Dec. 1, 2021); *https://legacy.deribit.com/pages/docs/futures* (last visited Dec. 1, 2021); and *https://www.binance.com/en/support/announcement/34801a0c405a4b058f9ae18a1a34cad3* (last visited Dec. 1, 2021). Thus, it would appear to require less capital commitment to manipulate the bitcoin price using bitcoin futures traded on BitMex or other unregulated futures platforms rather than the CME, given the lower margin requirements on such unregulated platforms. The Exchange does not address this. *See* SkyBridge Order, 87 FR at 3876.

[106] *See* Winklevoss Order, 83 FR at 37594; USBT Order, 85 FR at 12596–97.

[107] *See* Notice, 86 FR at 38136.

basis points, respectively.[108] NYSE Arca explains that this is comparable to the liquidity of existing commodity-based ETPs and that using more sophisticated execution strategies and additional liquidity sources would likely result in a lower cost to trade.[109] Thus, NYSE Arca concludes that the overall size of the bitcoin market and the ability for market participants (including authorized participants creating and redeeming in-kind with the Trust) to buy or sell large amounts of bitcoin without significant market impact supports the reasoning that the Shares are unlikely to become a predominant force on pricing in either the bitcoin spot or the bitcoin futures market.[110]

The record, however, does not demonstrate that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. NYSE Arca's assertions about the potential effect of trading in the Shares on the CME bitcoin futures market and bitcoin spot market are general and conclusory, repeating the aforementioned trade volume of the bitcoin futures market and the size and liquidity of the bitcoin spot market, as well as the market impact of a large transaction, without analysis or evidence to support these assertions. For example, there is no limit on the amount of mined bitcoin that the Trust may hold. Yet NYSE Arca does not provide any information on the expected growth in the size of the Trust and the resultant increase in the amount of bitcoin held by the Trust over time, or on the overall expected number, size, and frequency of creations and redemptions—or how any of the foregoing could (if at all) influence prices in the CME bitcoin futures market. Thus, the Commission cannot conclude, based on NYSE Arca's statements alone and absent any evidence or analysis in support of NYSE Arca's assertions, that it is unlikely that trading in the ETP would be the predominant influence on prices in the CME bitcoin futures market.[111]

The Commission also is not persuaded by NYSE Arca's assertions about the minimal effect a large market order to buy or sell bitcoin would have on the bitcoin market.[112] While NYSE Arca surmises by way of a $10 million market order example that buying or selling large amounts of bitcoin would have insignificant market impact, the conclusion does not analyze the extent of any impact on the CME bitcoin futures market, the market that the Exchange, in the proposal, argues is the significant market under consideration. Even assuming, however, that NYSE Arca is suggesting that a single $10 million order in bitcoin would have immaterial impact on the prices in the CME bitcoin futures market, this prong of the ''market of significant size'' determination concerns the influence on prices from trading *in* the proposed ETP, which is broader than just trading *by* the proposed ETP. While authorized participants of the Trust might only transact in the bitcoin spot market as part of their creation or redemption of Shares, the Shares themselves would be traded in the secondary market on NYSE Arca. The record does not discuss the expected number or trading volume of the Shares, or establish the potential effect of the Shares' trade prices on CME bitcoin futures prices. For example, NYSE Arca does not provide any data or analysis about the potential effect the quotations or trade prices of the Shares might have on market-maker quotations in CME bitcoin futures contracts and whether those effects would constitute a predominant influence on the prices of those futures contracts.[113]

Thus, because NYSE Arca has not provided sufficient information to establish both prongs of the ''market of significant size'' determination, the Commission cannot conclude that the CME bitcoin futures market is a ''market of significant size'' such that NYSE Arca would be able to rely on a surveillance-sharing agreement with the CME to provide sufficient protection against fraudulent and manipulative acts and practices.

The requirements of Section 6(b)(5) of the Exchange Act apply to the rules of national securities exchanges. Accordingly, the relevant obligation for a comprehensive surveillance-sharing agreement with a regulated market of significant size, or other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement, resides with the listing exchange. Because there is insufficient evidence in the record demonstrating that NYSE Arca has satisfied this obligation, the Commission cannot approve the proposed ETP for listing and trading on NYSE Arca.

C. Whether NYSE Arca Has Met Its Burden To Demonstrate That the Proposal Is Designed To Protect Investors and the Public Interest

NYSE Arca contends that, if approved, the proposed ETP would protect investors and the public interest. However, the Commission must consider these potential benefits in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[114] Because NYSE Arca has not demonstrated that its proposed rule change is designed to prevent fraudulent and manipulative acts and practices, the Commission must disapprove the proposal.

NYSE Arca asserts that the proposed rule change is designed to protect investors and the public interest because an investment in the Trust would provide investors with exposure to bitcoin in a manner that may be more efficient, more convenient, and more regulated than the purchase of bitcoin or other investment products that provide exposure to bitcoin.[115] For example, the Sponsor notes that OTC bitcoin funds, which have attracted significant investor interest, offer exposure to bitcoin in a similar manner as the Trust.[116] However, according to the Exchange, the OTC bitcoin funds do not offer a creation or redemption mechanism that would keep their shares trading in line with their NAVs and, as a result, OTC bitcoin funds have historically traded at significant premiums or discounts compared to their NAVs.[117] NYSE Arca asserts that, in contrast, if the Trust's Shares were to trade at a premium or discount compared to their NAV, creation or redemption could be facilitated by authorized participants to drive the value of the Shares towards their NAV.[118] The Exchange states that investors in OTC bitcoin funds also have historically borne significantly higher fees and expenses than those that would be borne by investors in the Trust.[119]

---

[108] *See id.* According to NYSE Arca, these statistics are based on three random daily samples of bitcoin liquidity in U.S. dollars (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Bitstamp, and itBit from January 1, 2021, to April 30, 2021. *See id.* at n.20.

[109] *See id.* at 38136.

[110] *See id.*

[111] *See* VanEck Order, 86 FR at 64548–59; WisdomTree Order, 86 FR at 69332–33; Kryptoin Order, 86 FR at 74177; SkyBridge Order, 87 FR at 3879; Wise Origin Order, 87 FR at 5537.

[112] *See supra* notes 108–110 and accompanying text.

[113] *See* VanEck Order, 86 FR at 64549; WisdomTree Order, 86 FR at 69333; Kryptoin Order, 86 FR at 74177; SkyBridge Order, 87 FR at 3879; Wise Origin Order, 87 FR at 5537.

[114] *See* Winklevoss Order, 83 FR at 37602. *See also* GraniteShares Order, 83 FR at 43931; ProShares Order, 83 FR at 43941; USBT Order, 85 FR at 12615.

[115] *See* Notice, 86 FR at 38134.

[116] *See id.*

[117] *See id.*

[118] *See id.*

[119] *See id.*

NYSE Arca further asserts that, with the growth of OTC bitcoin funds, so too has grown the potential risk to U.S. investors.[120] Specifically, NYSE Arca argues that significant and prolonged premiums and discounts, significant premium/discount volatility, high fees, insufficient disclosures, limited liquidity to trade or borrow shares, and the lack of surveillance and oversight through a listed exchange place U.S. investor money at risk in ways that could potentially be eliminated through access to the Shares.[121] As such, the Exchange believes that the proposal would act to limit risk to U.S. investors that are increasingly seeking exposure to bitcoin, while providing benefits such as the elimination of significant and prolonged premiums and discounts, the reduction of significant premium/discount volatility, the reduction of management fees through meaningful competition, the avoidance of risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure, and substantially greater surveillance and regulatory oversight.[122]

Additionally, the Exchange states that investors holding bitcoin through a cryptocurrency trading platform often face credit risk to the platform for cash balances, and often face risk of loss or theft of their bitcoin as a result of the platform using internet-connected storage (*i.e.,* ''hot'' wallets) and/or having poor private key management (*e.g.,* insufficient password protection, lost key, etc.).[123] The Exchange states that, on the other hand, through use of the Bitcoin Custodian, the Trust would hold bitcoin in 100% ''cold'' storage, meaning the entire storage process would be done completely offline, with a regulated and licensed entity (*i.e.,* the Bitcoin Custodian) applying industry best practices.[124]

In essence, NYSE Arca argues that the risky nature of direct investment in the underlying bitcoin and the unregulated markets on which bitcoin and OTC bitcoin funds trade compel approval of the proposed rule change. The Commission disagrees. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.[125] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.[126]

Here, even if it were true that, compared to trading in unregulated bitcoin spot markets or trading in OTC bitcoin funds, trading in a bitcoin-based ETP on a national securities exchange provides some additional protection to investors, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[127] As explained above, for bitcoin-based ETPs, the Commission has consistently required that the listing exchange have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin, or demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The listing exchange has not met that requirement here. Therefore, the Commission is unable to find that the proposed rule change is consistent with the statutory standard.

Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices.[128]

For the reasons discussed above, NYSE Arca has not met its burden of demonstrating that the proposal is consistent with Exchange Act Section 6(b)(5),[129] and, accordingly, the Commission must disapprove the proposal.[130]

D. Other Comments

The Commission received a comment letter that addressed the general nature and intrinsic value of bitcoin.[131] Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–NYSEArca–2021–57 be, and hereby is, disapproved.

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2022–05499 Filed 3–15–22; 8:45 am]

BILLING CODE 8011–01–P

[120] *See id.* at 38136.

[121] *See id.* For example, NYSE Arca states that the largest U.S. OTC bitcoin fund returned 46.41% year-to-date through April 30, 2021, while spot bitcoin returned 95.61% over the same period. NYSE Arca asserts that the deviation in price performance can be attributed to the fluctuation in NAV of this fund. *See id.*

[122] *See id.*

[123] *See id.* at 38134.

[124] *See id. See also supra* note 30.

[125] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[126] *See* SolidX Order, 82 FR at 16259; VanEck Order, 86 FR at 54550–51; WisdomTree Order, 86 FR at 69334; Kryptoin Order, 86 FR at 74179; Valkyrie Order, 86 FR at 74163; SkyBridge Order, 87 FR at 3881; Wise Origin Order, 87 FR at 5538.

[127] *See supra* note 114.

[128] *See* 15 U.S.C. 78s(b)(2)(C).

[129] 15 U.S.C. 78f(b)(5).

[130] In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[131] *See* Letter from Sam Ahn (July 21, 2021).

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36593]

OPSEU Pension Plan Trust Fund, Jaguar Transport Holdings, LLC, and Jaguar Rail Holdings, LLC—Continuance in Control Exemption—Charlotte Western Railroad, LLC

OPSEU Pension Plan Trust Fund (OPTrust), Jaguar Transport Holdings, LLC (JTH), and Jaguar Rail Holdings, LLC (JRH, and collectively with OPTrust and JTH, Jaguar), all noncarriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to continue in control of Charlotte Western Railroad, LLC (CWRR), a noncarrier, upon CWRR's becoming a Class III rail carrier.

This transaction is related to a concurrently filed verified notice of exemption in *Charlotte Western Railroad, LLC—Change in Operator Exemption—Line in Gaston County,*

N.C., Docket No. FD 36592. In that proceeding, CWRR has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to assume operation of approximately 13.04 miles of rail line currently operated by Piedmont and Northern Railroad LLC (PNRW) and owned by the North Carolina Department of Transportation (NCDOT), extending from milepost SFC 11.39 at Mt. Holly to milepost SFC 23.0 at Gastonia, including the Belmont Spur extending from milepost SFF 0.13/SFC 13.6 at Mt. Holly to milepost SFF 1.56 at or near Belmont (collectively, the Line), all in Gaston County, N.C. CWRR will assume an existing lease of the Line, to be assigned to CWRR by PNRW with NCDOT's consent.

Jaguar states that it will continue in control of CWRR upon CWRR's becoming a railroad common carrier. According to the verified notice, OPTrust indirectly controls JTH, which directly controls JRH. JTH currently controls, indirectly: Four Class III railroads directly controlled by JRH—Southwestern Railroad, Inc., Texas & Eastern Railroad, LLC, Wyoming and Colorado Railroad, Inc., (WYCO) (which also does business under the name Oregon Eastern Railroad), and Missouri Eastern Railroad, LLC; two Class III railroads indirectly controlled by JRH through WYCO—Cimarron Valley Railroad, L.C., and Washington Eastern Railroad, LLC; and one Class III railroad indirectly controlled by JTH through its subsidiary Jaguar Transport, LLC—West Memphis Base Railroad, L.L.C. The lines of the rail carriers controlled by JTH and JRH are located in Arkansas, Colorado, Kansas, Missouri, New Mexico, Oklahoma, Oregon, Texas, and Washington.

Jaguar states that: (1) The Line does not connect with any other rail lines operated by carriers controlled by Jaguar, and none of those rail lines connect with each other; (2) the continuance in control transaction is not part of a series of anticipated transactions that would connect the Line with any railroad lines controlled by Jaguar or that would connect any of those rail lines with each other; and (3) the transaction does not involve a Class I rail carrier. Therefore, the proposed transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

The earliest this transaction may be consummated is March 30, 2022, the effective date of the exemption (30 days after the verified notice was filed). If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than March 23, 2022.

All pleadings, referring to Docket No. FD 36593, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on Jaguar's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to Jaguar, this action is excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: March 10, 2022.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2022–05527 Filed 3–15–22; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36592]

Charlotte Western Railroad, LLC—Change in Operator Exemption—Piedmont & Northern Railroad, LLC

Charlotte Western Railroad, LLC (CWRR), a noncarrier, has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to assume operation of approximately 13.04 miles of rail line extending from milepost SFC 11.39 at Mt. Holly to milepost SFC 23.0 at Gastonia, including the Belmont Spur extending from milepost SFF 0.13/SFC 13.6 at Mt. Holly to milepost SFF 1.56 at or near Belmont (collectively, the Line), all in Gaston County, N.C. The North Carolina Department of Transportation (NCDOT) owns the Line, and Piedmont and Northern Railroad, LLC (PNRW), currently operates the Line under a lease with NCDOT (the Lease) and has done so since 2017.[1]

According to the verified notice, CWRR has entered into an agreement with PNRW—with NCDOT's consent—under which PNRW will assign its rights and obligations under the Lease to operate the Line to CWRR, and CWRR will commence common carrier operations over the Line in place of PNRW. Based on projected annual revenues for the Line, CWRR expects to become a Class III rail carrier after consummation of the proposed transaction.

This transaction is related to a concurrently filed verified notice in *OPSEU Pension Plan Trust Fund, Jaguar Transport Holdings, LLC, & Jaguar Rail Holdings, LLC—Continuance in Control Exemption—Charlotte Western Railroad, LLC,* Docket No. FD 36593, in which the filings parties seek to continue in control of CWRR upon CWRR's becoming a Class III rail carrier.

As required under 49 CFR 1150.33(h)(1), CWRR certifies in its verified notice that the proposed change of operator on the Line does not involve, and the Lease between NCDOT and PNRW does not include, any provision or agreement that may limit future interchange with a third-party connecting carrier.

CWRR certifies that its projected annual revenues as a result of the transaction will not exceed $5 million and will not result in the creation of a Class I or Class II rail carrier. Under 49 CFR 1150.32(b), a change in operator exemption requires that notice be given to shippers. CWRR certifies that it has provided notice of the proposed change in operator to the shippers on the Line.

The transaction may be consummated on or after March 30, 2022, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than March 23, 2022 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36592, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on CWRR's representative,

[1] *See Piedmont & N. R.R.—Change in Operator Exemption—Piedmont Ry.,* FD 36120 (STB served June 16, 2017).

Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to CWRR, this action is categorically excluded from historic preservation reporting requirements under 49 CFR 1105.8(b) and from environmental reporting requirements under 49 CFR 1105.6(c).

Board decisions and notices are available at *www.stb.gov.*

Decided: March 10, 2022.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2022–05529 Filed 3–15–22; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2021–0017]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 23 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. The exemptions enable these hard of hearing and deaf individuals to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on March 4, 2022. The exemptions expire on March 4, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number, FMCSA–2021–0017, in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

On January 19, 2022, FMCSA published a notice announcing receipt of applications from 23 individuals requesting an exemption from the hearing requirement in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (87 FR 2979). The public comment period ended on February 18, 2022, and two comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 3, 1971).

III. Discussion of Comments

FMCSA received two comments in this proceeding. Both comments received indicated that Gary Sturdevant submitted a hearing exemption application to FMCSA.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on current medical information and literature, and the 2008 Evidence Report, ''Executive Summary on Hearing, Vestibular Function and Commercial Motor Driving Safety.'' The evidence report reached two conclusions regarding the matter of hearing loss and CMV driver safety: (1) No studies that examined the relationship between hearing loss and crash risk exclusively among CMV drivers were identified; and (2) evidence from studies of the private driver's license holder population does not support the contention that individuals with hearing impairment are at an increased risk for a crash. In addition, the Agency reviewed each applicant's driving record found in the Commercial Driver's License Information System, for commercial driver's license (CDL) holders, and inspections recorded in the Motor Carrier Management Information System. For non-CDL holders, the Agency reviewed the driving records from the State Driver's Licensing Agency. Each applicant's record demonstrated a safe driving history. Based on an individual assessment of each applicant that focused on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce, the Agency believes the drivers granted this exemption have demonstrated that they do not pose a risk to public safety.

Consequently, FMCSA finds that in each case exempting these applicants from the hearing standard in § 391.41(b)(11) is likely to achieve a

level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must report any crashes or accidents as defined in § 390.5; (2) each driver must report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver is prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 23 exemption applications, FMCSA exempts the following drivers from the hearing standard, § 391.41(b)(11), subject to the requirements cited above:

Yunier Alegre (FL)
Kenneth Alston (NJ)
Charles Armand (NJ)
Baldemar Barba (TX)
Gary Barber (WI)
Desmond Dantzler (AZ)
Jeremy Descloux (WA)
Philip Fatigato (IL)
William Hoke (NY)
Edward Larizza (CA)
Kevin Maddox (GA)
Bikien McKoy (NC)
Rage Muse (MN)
Orlando Padilla (FL)
Michael Paul (IL)
Aaron Pitsker (CA)
Michael Principe (TX)
William Rivas (CA)
Kenneth Salts (OH)
Isaac Soto (IL)
Gary Sturdevant (TX)
Richard Taulbee (GA)
Matthew Taylor (TX)

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2022–05515 Filed 3–15–22; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0004]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Petitions for Exemption From the Vehicle Theft Prevention Standard

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a reinstatement of a previously approved information collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) summarized below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period for approval of a reinstatement of this previously approved information collection was published on August 20, 2020. The agency received no comments.

DATES: Comments must be submitted on or before April 15, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection, including suggestions for reducing burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard at the National Highway Traffic Safety Administration, Office of International Policy, Fuel Economy and Consumer Programs (NRM–310), 1200 New Jersey Ave. SE, West Building, Room W43–439, Washington, DC 20590. Ms. Ballard's telephone number is (202) 366–5222. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), a Federal agency must receive approval from the Office of Management and Budget (OMB) before it collects certain information from the public and a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In compliance with these requirements, this notice announces that the following information collection request will be submitted to OMB.

A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on August 20, 2020 (85 FR 51548).

Title: Petitions for Exemption from the Vehicle Theft Prevention Standard (49 CFR part 543).

OMB Control Number: 2127–0542.

Type of Request: Reinstatement of a previously approved information collection.

Type of Review Requested: Regular.

Length of Approval Requested: Three years.

Affected Public: Motor vehicle manufacturers.

Summary of Information Collection: 49 U.S.C. Chapter 331 requires the Secretary of Transportation, and NHTSA by delegation, to promulgate a theft prevention standard to provide for the identification of certain motor vehicles and their major replacement parts (parts-marking) to impede motor vehicle theft. NHTSA's theft prevention standard at 49 CFR part 541 specifies performance requirements for identifying numbers or symbols (generally the vehicle identification number (VIN)) to be placed on major parts of all passenger vehicles subject to the theft prevention standard. 49 U.S.C. 33106 allows manufacturers who equip covered vehicles with standard original equipment antitheft devices to petition for an exemption from the parts-marking requirements. NHTSA may exempt a vehicle line from the parts-marking requirement if the manufacturer installs an antitheft device as standard equipment on the entire vehicle line for which it seeks an exemption, and NHTSA determines that the antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements.

Under the current part 543, manufacturers choose how they wish to

demonstrate to the agency that the anti-theft device they are installing in a vehicle line meets the requirements for exemption: By either the factors listed in § 543.6 (specific content requirements: Detailed lists, data, and explanations) or by the criteria listed in § 543.7 (performance criteria). Section 543.6 requires the manufacturer to submit: (1) A statement that an antitheft device will be installed as standard equipment on all vehicles in the line for which an exemption is sought; (2) a list naming each component in the antitheft system, and a diagram showing the location of each of those components within the vehicle; (3) a discussion that explains the means and process by which the device is activated and functions, including any aspect of the device designed to facilitate or encourage its activation by motorists, attract attention to the efforts of an unauthorized person to enter or move the vehicle by means other than a key, prevent defeating or circumventing the device by an unauthorized person attempting to enter a vehicle by means other than a key, prevent the operation of a vehicle which an unauthorized person has entered using means other than a key, and ensure the reliability and durability of the device; (4) the reasons for the petitioner's belief that the antitheft device will be effective in reducing and deterring motor vehicle theft, including any theft data and other data that are available to the petitioner and form the basis for that belief; (5) the reasons for the petitioner's belief that the agency should determine that the antitheft device is likely to be as effective as compliance with the parts-marking requirements of part 541 in reducing and deterring motor vehicle theft, including any statistical data that are available to the petitioner and form a basis for petitioner's belief that a line of passenger motor vehicles equipped with the antitheft device is likely to have a theft rate equal to or less than that of passenger motor vehicles of the same, or similar, line which have parts marked in compliance with part 541.

Section 543.7 requires manufacturers to submit a statement that the entire line of vehicles is equipped with an immobilizer, as standard equipment, that meets one of the following: (1) The performance criteria of (subsections 8 through 21) of C.R.C, c. 1038.114, Theft Protection and Rollaway Prevention (in effect March 30, 2011), as excerpted in appendix A of this part; (2) National Standard of Canada CAN/ULC–S338–98, Automobile Theft Deterrent Equipment and Systems: Electronic Immobilization (May 1998); (3) United Nations Economic Commission for Europe (UN/ECE) Regulation No. 97 (ECE R97), Uniform Provisions Concerning Approval of Vehicle Alarm System (VAS) and Motor Vehicles with Regard to Their Alarm System (AS) in effect August 8, 2007; or (4) UN/ECE Regulation No. 116 (ECE R116), Uniform Technical Prescriptions Concerning the Protection of Motor Vehicles Against Unauthorized Use in effect on February 10, 2009. Manufacturers must also submit documentation kept to demonstrate that the device conforms with the performance criteria and a statement that the immobilizer device is durable and reliable.

Description of the Need for the Information and Proposed Use of the Information: NHTSA requires this information to determine whether an anti-theft device a manufacturer is installing in a vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements and therefore meets the requirements for the grant of an exemption from part 541 parts-marking requirements.

Estimated Number of Respondents: 12.

There are approximately 23 vehicle manufacturers that could request an exemption per model year. For MYs 2017–2020, the agency received 32 petitions for exemption from the parts-marking requirements, with 12 of those petitions received in the most recent year. Nine respondents filed under § 543.6 and three respondents filed under § 543.7. NHTSA anticipates that the number of petitions received in each of the next three years will be the same as the number of petitions received in the most recent year, *i.e.,* approximately 12 per year.

Estimated Total Annual Burden Hours: 2,094.

NHTSA estimates, based on information provided by manufacturers, that 226 hours will be required for exemptions requested under § 543.6, and 20 hours for exemptions requested under § 543.7. The agency expects that, similar to 2020, nine manufacturers will choose to file for an exemption under § 543.6 and three manufacturers will choose to file for an exemption under § 543.7. The estimated total annual burden hours are shown below:

	Average number of petitions per year	Average time per petition submittal (hours)	Total annual hours
Preparation and Submittal of Petition for Exemption under § 543.6	9	226	2,034
Preparation and Submittal of Petition for Exemption under § 543.7	3	20	60
Estimated Total Annual Burden Hours:	.....	.....	2,094

The labor cost associated with the burden hours for this collection is derived by (1) applying appropriate average hourly labor rate for ''Compliance Officers,'' Occupation Code 13–1041, published by the Bureau of Labor Statistics,[1] (2) dividing by 0.701 [2] (70.1%) to obtain the total compensation rate for private industry workers, and (3) multiplying by the estimated labor hours for each exemption type.

[1] May 2018 National Occupational Employment and Wage Estimates, United States. Business and Financial Operations Occupations, Compliance Officers, Occupation Code 13–1041; Mean Hourly Wage = $34.86. *https://www.bls.gov/oes/current/oes_nat.htm.* Accessed Mar. 9, 2020.

[2] *See* Table 1 at *https://www.bls.gov/news.release/ecec.t01.htm.*

	Hourly labor cost	Average time per petition submittal (hours)	Labor cost/petition	Estimated No. of Petitions/ Year	Annual labor cost
Preparation and Submittal of Petition for Exemption under § 543.6	$49.73	226	$11,238.98	9	$101,151
Preparation and Submittal of Petition for Exemption under § 543.7	49.73	20	994.60	3	2,984
Estimated Annual Labor Cost for This Information Collection:	.....	.....	.....	.....	$104,135

Estimated Total Annual Burden Cost to Respondents: $0.

NHTSA estimates that there will be no costs to respondents other than labor costs associated with burden hours.

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29)

Issued in Washington, DC.

Raymond R. Posten,

Associate Administrator for Rulemaking.

[FR Doc. 2022–05574 Filed 3–15–22; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Theft Prevention Standard; Volkswagen Group of America, Inc.

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the Volkswagen Group of America, Inc.'s (Volkswagen) petition for exemption from the Federal Motor Vehicle Theft Prevention Standard (theft prevention standard) for its Audi e-tron GT vehicle line beginning in model year (MY) 2023. The petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard. Volkswagen also requested confidential treatment for specific information in its petition. Therefore, no confidential information provided for purposes of this notice has been disclosed.

DATES: The exemption granted by this notice is effective beginning with the 2023 model year.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard, Office of International Policy, Fuel Economy, and Consumer Programs, NHTSA, West Building, W43–439, NRM–310, 1200 New Jersey Avenue SE, Washington, DC 20590. Ms. Ballard's phone number is (202) 366–5222. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: Under 49 U.S.C. chapter 331, the Secretary of Transportation (and the National Highway Traffic Safety Administration (NHTSA) by delegation) is required to promulgate a theft prevention standard to provide for the identification of certain motor vehicles and their major replacement parts to impede motor vehicle theft. NHTSA promulgated regulations at 49 CFR part 541 (theft prevention standard) to require parts-marking for specified passenger motor vehicles and light trucks. Pursuant to 49 U.S.C. 33106, manufacturers that are subject to the parts-marking requirements may petition the Secretary of Transportation for an exemption for a line of passenger motor vehicles equipped with an antitheft device as standard equipment that the Secretary decides is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements. In accordance with this statute, NHTSA promulgated 49 CFR part 543, which establishes the process through which manufacturers may seek an exemption from the theft prevention standard.

49 CFR 543.5 provides general submission requirements for petitions and states that each manufacturer may petition NHTSA for an exemption of one vehicle line per model year. Among other requirements, manufacturers must identify whether the exemption is sought under § 543.6 or § 543.7. Under § 543.6, a manufacturer may request an exemption by providing specific information about the antitheft device, its capabilities, and the reasons the petitioner believes the device to be as effective at reducing and deterring theft as compliance with the parts-marking requirements. Section 543.7 permits a manufacturer to request an exemption under a more streamlined process if the vehicle line is equipped with an antitheft device (an ''immobilizer'') as standard equipment that complies with one of the standards specified in that section.[1]

Section 543.8 establishes requirements for processing petitions for exemption from the theft prevention standard. As stated in § 543.8(a), NHTSA processes any complete exemption petition. If NHTSA receives an incomplete petition, NHTSA will notify the petitioner of the deficiencies. Once NHTSA receives a complete petition the agency will process it and, in accordance with § 543.8(b), will grant the petition if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to

[1] 49 CFR 543.7 specifies that the manufacturer must include a statement that their entire vehicle line is equipped with an immobilizer that meets one of the following standards: (1) The performance criteria (subsections 8 through 21) of C.R.C, c. 1038.114, *Theft Protection and Rollaway Prevention (in effect March 30, 2011),* as excerpted in appendix A of [part 543]; (2) National Standard of Canada CAN/ULC–S338–98, *Automobile Theft Deterrent Equipment and Systems: Electronic Immobilization* (May 1998); (3) United Nations Economic Commission for Europe (UN/ECE) Regulation No. 97 (ECE R97), *Uniform Provisions Concerning Approval of Vehicle Alarm System (VAS) and Motor Vehicles with Regard to Their Alarm System (AS)* in effect August 8, 2007; or (4) UN/ECE Regulation No. 116 (ECE R116), *Uniform Technical Prescriptions Concerning the Protection of Motor Vehicles Against Unauthorized Use* in effect on February 10, 2009.

be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541.

Section 543.8(c) requires NHTSA to issue its decision either to grant or to deny an exemption petition not later than 120 days after the date on which a complete petition is filed. If NHTSA does not make a decision within the 120-day period, the petition shall be deemed to be approved and the manufacturer shall be exempt from the standard for the line covered by the petition for the subsequent model year.[2] Exemptions granted under part 543 apply only to the vehicle line or lines that are subject to the grant and that are equipped with the antitheft device on which the line's exemption was based, and are effective for the model year beginning after the model year in which NHTSA issues the notice of exemption, unless the notice of exemption specifies a later year.

Sections 543.8(f) and (g) apply to the manner in which NHTSA's decisions on petitions are to be made known. Under § 543.8(f), if the petition is sought under § 543.6, NHTSA publishes a notice of its decision to grant or deny the exemption petition in the **Federal Register** and notifies the petitioner in writing. Under § 543.8(g), if the petition is sought under § 543.7, NHTSA notifies the petitioner in writing of the agency's decision to grant or deny the exemption petition.

This grant of petition for exemption considers Volkswagen Group of America, Inc.'s (Volkswagen) petition for its Audi e-tron GT vehicle line beginning in MY 2023.

I. Specific Petition Content Requirements Under 49 CFR 543.6

Pursuant to 49 CFR part 543, *Exemption from Vehicle Theft Prevention,* Volkswagen petitioned for an exemption for its specified vehicle line from the parts-marking requirements of the theft prevention standard, beginning in MY 2023. Volkswagen petitioned under 49 CFR 543.6, *Petition: Specific content requirements,* which, as described above, requires manufacturers to provide specific information about the antitheft device installed as standard equipment on all vehicles in the line for which an exemption is sought, the antitheft device's capabilities, and the reasons the petitioner believes the device to be as effective at reducing and deterring theft as compliance with the parts-marking requirements.

More specifically, § 543.6(a)(1) requires petitions to include a statement that an antitheft device will be installed as standard equipment on all vehicles in the line for which the exemption is sought. Under § 543.6(a)(2), each petition must list each component in the antitheft system, and include a diagram showing the location of each of those components within the vehicle. As required by § 543.6(a)(3), each petition must include an explanation of the means and process by which the device is activated and functions, including any aspect of the device designed to: (1) Facilitate or encourage its activation by motorists; (2) attract attention to the efforts of an unauthorized person to enter or move a vehicle by means other than a key; (3) prevent defeating or circumventing the device by an unauthorized person attempting to enter a vehicle by means other than a key; (4) prevent the operation of a vehicle which an unauthorized person has entered using means other than a key; and (5) ensure the reliability and durability of the device.[3]

In addition to providing information about the antitheft device and its functionality, petitioners must also submit the reasons for their belief that the antitheft device will be effective in reducing and deterring motor vehicle theft, including any theft data and other data that are available to the petitioner and form a basis for that belief,[4] and the reasons for their belief that the agency should determine that the antitheft device is likely to be as effective as compliance with the parts-marking requirements of part 541 in reducing and deterring motor vehicle theft. In support of this belief, the petitioners should include any statistical data that are available to the petitioner and form the basis for the petitioner's belief that a line of passenger motor vehicles equipped with the antitheft device is likely to have a theft rate equal to or less than that of passenger motor vehicles of the same, or a similar, line which have parts-marked in compliance with part 541.[5]

The following sections describe Volkswagen's petition information provided pursuant to 49 CFR part 543, *Exemption from Vehicle Theft Prevention.* To the extent that specific information in Volkswagen's petition is subject to a properly filed confidentiality request, that information was not disclosed as part of this notice.[6]

II. Volkswagen's Petition for Exemption

In a petition dated November 29, 2021, Volkswagen requested an exemption from the parts-marking requirements of the theft prevention standard for its Audi e-tron GT vehicle line beginning with MY 2023.

In its petition, Volkswagen provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for its Audi e-tron GT vehicle line. Volkswagen stated that its fifth generation transponder-based electronic engine immobilizer antitheft device will be installed as standard equipment on the entire MY 2023 Audi e-tron GT vehicle line, including any sport or special editions within the line. Key components of the antitheft device will include an adapted ignition key (ID-transmitter or ''key fob''), body computer 2 (BMC2) as the immobilizer's primary control unit, park lock actuator as a secondary control unit and power control units one and two as secondary control units.

Pursuant to § 543.6(a)(3), Volkswagen explained that its immobilizer device actively incorporates the power control unit into the evaluation and monitoring process. Volkswagen also stated that activation of its immobilizer device occurs automatically after the engine is switched off. Deactivation of the immobilizer device occurs when the ignition is turned on or the key fob is recognized by the immobilizer control unit. Specifically, when turning on the ignition on/off switch, the key transponder sends a fixed code to the immobilizer control unit. If this is identified as the correct code, a variable code is generated in the immobilizer control unit and sent to the transponder. Volkswagen stated that a secret arithmetic process is then started according to a set of specific equations and that a new variable code is generated every time the immobilizer goes through the secret computing process. The results of the computing process are evaluated in the control unit and if verified, the vehicle key is acknowledged as correct. The engine control unit then sends a variable code to the immobilizer control unit for mutual identification. If all the data matches, the vehicle can be started.

As required in § 543.6(a)(3)(v), Volkswagen provided information on the reliability and durability of its proposed device. To ensure reliability and durability of the device, Volkswagen stated that the antitheft device has been tested for compliance with its corporate requirements, including those for electrical and

[2] 49 U.S.C. 33106(d).

[3] 49 CFR 543.6(a)(3).

[4] 49 CFR 543.6(a)(4).

[5] 49 CFR 543.6(a)(5).

[6] 49 CFR 512.20(a).

electronic assemblies in motor vehicles related to performance requirements including electrical system temperature stability, mechanical integrity, electrical performance, electromagnetic compatibility (EMC), environmental compatibility and service life.

In accordance with 49 CFR 543.6(a)(5), Volkswagen provided data on the theft rate of similarly-sized vehicle lines that had been granted an exemption from the parts-marking requirement. Volkswagen also referenced the effectiveness of immobilizer devices installed on other vehicles for which NHTSA has granted exemptions. Specifically, Volkswagen referenced information from the Highway Loss Data Institute which showed that BMW vehicles experienced theft loss reductions resulting in a 73% decrease in relative claim frequency and a 78% lower average loss payment per claim for vehicles equipped with an immobilizer. Volkswagen also stated that the National Crime Information Center's (NCIC) theft data showed that there was a 70% reduction in theft experienced when comparing the MY 1987 Ford Mustang vehicle thefts (with immobilizers) to MY 1995 Ford Mustang vehicle thefts (without immobilizers).

III. Decision To Grant the Petition

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.8(b), the agency grants a petition for exemption from the parts-marking requirements of part 541, either in whole or in part, if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541. The agency finds that Volkswagen has provided adequate reasons for its belief that the antitheft device for its vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard. This conclusion is based on the information the Volkswagen provided about its antitheft device. NHTSA believes, based on the supporting evidence submitted by Volkswagen, that the antitheft device described for its vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard.

The agency concludes that Volkswagen's antitheft device will provide the five types of performance features listed in § 543.6(a)(3): Promoting activation; attracting attention to the efforts of unauthorized persons to enter or operate a vehicle by means other than a key; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

The agency notes that 49 CFR part 541, Appendix A–1, identifies those lines that are exempted from the theft prevention standard for a given model year. 49 CFR 543.8(f) contains publication requirements incident to the disposition of all part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking requirements of the theft prevention standard.

If Volkswagen decides not to use the exemption for its requested vehicle line, the manufacturer must formally notify the agency. If such a decision is made, the line must be fully marked as required by 49 CFR 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if Volkswagen wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Section 543.8(d) states that a part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, § 543.10(c)(2) provides for the submission of petitions ''to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in the exemption.''

The agency wishes to minimize the administrative burden that § 543.10(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be de minimis. Therefore, NHTSA suggests that if Volkswagen contemplates making any changes, the effects of which might be characterized as de minimis, it should consult the agency before preparing and submitting a petition to modify.

For the foregoing reasons, the agency hereby grants in full Volkswagen's petition for exemption for the Audi e-tron GT vehicle line from the parts-marking requirements of 49 CFR part 541, beginning with its MY 2023 vehicles.

Issued under authority delegated in 49 CFR 1.95 and 501.8.

Raymond R. Posten,

Associate Administrator for Rulemaking.

[FR Doc. 2022–05571 Filed 3–15–22; 8:45 am]

BILLING CODE 4910–59–P

FEDERAL REGISTER

Vol. 87 Wednesday,
No. 51 March 16, 2022

Part II

Securities and Exchange Commission

17 CFR Parts 240, 242, and 249
Short Position and Short Activity Reporting by Institutional Investment Managers; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240, 242, and 249

[RELEASE NO. 34–94313; FILE NO. S7–08–22]

RIN 3235–AM34

Short Position and Short Activity Reporting by Institutional Investment Managers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is proposing a new rule and related form pursuant to the Securities Exchange Act of 1934 (the ''Exchange Act''), including Section 13(f)(2), which was added by Section 929X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''DFA''). The proposed rule and related form are designed to provide greater transparency through the publication of short sale related data to investors and other market participants. Under the rule, institutional investment managers that meet or exceed a specified reporting threshold would be required to report, on a monthly basis using the proposed form, specified short position data and short activity data for equity securities. In addition, the Commission is proposing a new rule under the Exchange Act to prescribe a new ''buy to cover'' order marking requirement, and proposing to amend the national market system plan governing the consolidated audit trail (''CAT'') created pursuant to the Exchange Act to require the reporting of ''buy to cover'' order marking information and reliance on the bona fide market making exception in the Commission's short sale rules. The Commission is publishing the text of the proposed amendments to the CAT NMS Plan in a separate notice.

DATES: Comments should be received on or before April 26, 2022.

ADDRESSES: Comments should be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–08–22 on the subject line.

Paper Comments:

- Send paper comments to: Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–08–22. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *https://www.sec.gov/* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Timothy M. Riley, Branch Chief; Patrice M. Pitts, Special Counsel; James R. Curley, Special Counsel; Quinn Kane, Special Counsel; Jessica Kloss, Attorney Advisor; Brendan McLeod, Attorney Advisor; and Josephine J. Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, at (202) 551–5777.

SUPPLEMENTARY INFORMATION: The Commission today is proposing for comment new rule 13f–2 (''Proposed Rule 13f–2'') (17 CFR 240.13f–2) and related form (''Proposed Form SHO'') (17 CFR 249.333) under the Exchange Act. Proposed Rule 13f–2 would require certain institutional investment managers to report, on a monthly basis on new Proposed Form SHO, certain short position data and short activity data for certain equity securities as prescribed in Proposed Rule 13f–2.

The Commission is also proposing for comment a new rule prescribing a ''buy to cover'' order marking requirement under Regulation SHO (''Proposed Rule 205'') (17 CFR 242.205), and amendments to the national market system plan governing the CAT, pursuant to Rules 608(a)(2) [17 CFR 242.608(a)(2)] and 608(b)(2) [17 CFR 242.608(b)(2)] of the Exchange Act (''Proposal to Amend CAT'') that enable the Commission to propose amendments to any effective national market system (''NMS'') plan. For the text of the proposed amendments to the CAT NMS Plan, please see the Notice of Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-related Data Collection.[1]

Proposed Rule 13f–2, Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT are hereinafter collectively referred to as the ''Proposals.''

Table of Contents

[1] *See Notice of the Text of the Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-related Data Collection,* Exchange Act Release No. 34–94314 (Feb. 25, 2022).

I. Introduction

A short sale involves the sale of a security that the seller does not own, or a sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[2] Short selling has long been used in financial markets as a means to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand,[3] or to hedge the risk of a long position in the same security or a related security.[4] Short selling has also been shown to improve pricing efficiency by providing information to the market.[5] While short selling can serve useful market purposes, it also may be used to drive down the price of a security, to accelerate a declining market in a security, or to manipulate stock prices.[6]

The Commission has plenary authority under Section 10(a) of the Exchange Act to regulate short sales of securities registered on a national securities exchange, as necessary or appropriate in the public interest or for the protection of investors. Current regulatory requirements applicable to short sales of equity securities are generally found in Regulation SHO, which became effective on January 3, 2005.[7] Regulation SHO imposes four general requirements with respect to short sales of equity securities. It requires broker-dealers to properly mark sale orders as ''long,'' ''short,'' or ''short exempt;'' [8] before effecting a short sale, to locate a source of shares that the seller reasonably believes can be timely delivered (commonly referred to as the ''locate'' requirement); [9] and to close out failures to deliver that result from long or short sales.[10] Further, Regulation SHO imposes a short sale price test circuit breaker.[11] In addition, the Commission adopted an antifraud provision, Rule 10b–21, to address failures to deliver in securities that have been associated with ''naked'' short selling.[12] As discussed below, Proposed Rule 13f–2 would apply to equity securities that are subject to Regulation SHO in order to be consistent with those requirements.

DFA Section 929X added Section 13(f)(2) of the Exchange Act, titled ''Reports by institutional investment managers,'' which requires the Commission to prescribe rules to make certain short sale data publicly available no less frequently than monthly.[13] Specifically, Section 13(f)(2) provides that the Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.[14]

Proposed Rule 13f–2 is designed to provide greater transparency through the publication of certain short sale related data to investors and other market participants by requiring certain institutional investment managers to report to the Commission, on a monthly basis on Proposed Form SHO, certain short position data and short activity data for certain equity securities. More information about the short sale activity and short positions of institutional investment managers (''Managers'') [15] may promote greater risk management among market participants, and may facilitate capital formation to the extent that greater transparency bolsters confidence in the markets.

Proposed Rule 205 would establish a new ''buy to cover'' order marking requirement for certain purchase orders effected by a broker-dealer for its own account or for the account of another person at the broker-dealer. The Proposal to Amend CAT would require CAT reporting firms to report short sale data not currently required that would enhance regulators' understanding of the lifecycle of a trade—from order origination, including an order's mark, through order execution and allocation.

---

[2] *See* 17 CFR 242.200(a).

[3] Market liquidity is generally provided through short selling by market professionals, such as market makers, who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of a temporary contraction of selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers. *See Amendments to Regulation SHO,* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11235 (Mar. 10, 2010) (''Rule 201 Adopting Release'').

[4] *See Short Sales,* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (''Regulation SHO Adopting Release'').

[5] *See, e.g.,* Phil Mackintosh, *How Short Selling Makes Markets More Efficient,* NASDAQ (Oct. 1, 2020), *available at https://www.nasdaq.com/articles/how-short-selling-makes-markets-more-efficient-2020-10-01.* Efficient markets require that prices fully reflect all buy and sell interest. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security. *See* Rule 201 Adopting Release, 75 FR at 11235 n.29 and 30. *See generally* discussion *infra* Part VIII.D.2.

[6] *See, e.g.,* Division of Economic and Risk Analysis, Short Sale Position and Transaction Reporting 6–7 (June 5, 2014) (''DERA 417(a)(2) Study''), *available at https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf.* (This is a study of the Staff of the U.S. Securities and Exchange Commission, which represents the views of Commission staff, and is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this study and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.); Rule 201 Adopting Release, 75 FR at 11235 (describing a ''bear raid'' where an equity security is sold short in an effort to drive down the price of the security by creating an imbalance of sell-side interest, as an example of unrestricted short selling that could ''exacerbate a declining market in a security by increasing pressure from the sell-side, eliminating bids, and causing a further reduction in the price of a security by creating an appearance that the security's price is falling for fundamental reasons, when the decline, or the speed of the decline, is being driven by other factors''). *See generally* discussion *infra* Part VIII.D.1.

[7] *See* Regulation SHO Adopting Release, *supra* note 4.

[8] *See* 17 CFR 242.200(g). A broker or dealer must mark all sell orders of an equity security as ''long,'' ''short,'' or ''short exempt.'' A sell order may only be marked ''long'' if the seller is ''deemed to own'' the security being sold and either (i) the security to be delivered is in the physical possession or control of the broker or dealer; or (ii) it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction. *See id.* A person is deemed to own a security only to the extent that he has a net long position in such security. *See* 17 CFR 242.200(c). Once marked as long, short, or short-exempt, the order mark should not be changed regardless of any subsequent changes in the person's net position. *See* OZ Mgmt., Exchange Act Release No. 75445 (July 14, 2015) (settled) (where OZ Management submitted short sale orders to its executing broker, but identified such sales as long sales to its prime broker, causing books and records of the prime broker to be inaccurate), *available at https://www.sec.gov/litigation/admin/2015/34-75445.pdf.*

[9] *See* 17 CFR 242.203(b)(1) through (2).

[10] *See* 17 CFR 242.204.

[11] *See* 17 CFR 242.201.

[12] *See* Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666 (Oct. 17, 2008).

[13] Public Law 111–203, 929X, 124 Stat. 1376, 1870 (July 21, 2010).

[14] 15 U.S.C. 78m(f)(2).

[15] As defined in Section 13(f)(6)(A) of the Exchange Act and for purposes of Proposed Rule 13f–2, ''institutional investment manager'' includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person. As such, the term ''institutional investment manager'' typically can include investment advisers, banks, insurance companies, broker-dealers, pension funds and corporations. *See also* Instructions to Form 13F.

Proposed Rule 205 and the Proposal to Amend CAT are intended to supplement the short sale data made available to the Commission in Proposed Form SHO filings by requiring the reporting to CAT of (i) ''buy to cover'' order marking information and (ii) reliance on the bona fide market making exception in Regulation SHO. The Commission believes greater transparency of short sale activity and short position data would improve the Commission's oversight of financial markets and compliance with existing regulations, as well as facilitate regulators' ability to reconstruct significant market events, which may, in turn, improve the Commission's ability to respond to similar events in the future.[16] This could, in turn, benefit the public and market participants by aiding the Commission in more effectively maintaining a fair and orderly market.

The Commission believes that the short sale related information that would be collected under the Proposals, particularly the required disclosures of Proposed Form SHO and the aggregated data published pursuant to Proposed Rule 13f–2, would fill an information gap for market participants and regulators by providing insights into the lifecycle of a short sale. In contrast to data related to short sales that is currently collected and published by FINRA and most exchanges, the aggregated information derived from information reported on Proposed Form SHO and published pursuant to Proposed Rule 13f–2 would reflect the timing of increases and decreases in the reported short positions.[17] Such aggregated information would help inform market participants regarding the overall short sale activity by reporting Managers. The information reported on Proposed Form SHO, along with the information gleaned through the operation of Proposed Rule 205 and the Proposal to Amend CAT would help the Commission and SROs to overcome current challenges in using data from CAT to estimate short positions and changes in short positions.[18]

The Commission acknowledges that the Proposals would entail costs to some market participants—more specifically, compliance costs associated with determining whether the Manager is required to report on Proposed Form SHO and, if so, with filing Proposed Form SHO, pursuant to Proposed Rule 13f–2, and the costs associated with accommodating the additional order marks, pursuant to Proposed Rule 205 and the Proposal to Amend CAT. Implementing Proposed Rule 13f–2 and Proposed Form SHO could also reduce certain industry participants' incentives to gather information about the marketplace and specific securities. For example, requiring disclosure of short positions could facilitate copycat trading that, in turn, could limit the profit an investor may earn using strategies developed in connection with its marketplace information gathering efforts.[19] In addition, requiring disclosure of large short positions, even in an aggregated format, could make holders of such short positions more susceptible to short squeezes. To the extent that these circumstances could reduce the value of marketplace information gathered to develop a short selling strategy, they could discourage investors from making an effort to gather marketplace information. A reduction in information collection could harm price efficiency, which could, in turn, affect capital allocations and managerial decisions. Aggregating short sale activity and short position information across all reporting Managers for each reported equity security prior to publication and publishing such data on a delay would likely mitigate—though not fully eliminate—the potential negative economic effects of the reporting requirements and associated information disclosure of Proposed Rule 13f–2 and Proposed Form SHO.

Proposed Rule 13f–2 and Proposed Form SHO are designed to address the requirements of Section 13(f)(2). In developing Proposed Rule 13f–2, the Commission recognizes the need to consider the important role short selling plays in the market as well as the benefits of providing more disclosure about short selling. For reasons discussed more fully below, the Commission believes Proposed Rule 13f–2 represents an appropriate balance by offering increased transparency into the short selling activities of certain Managers with large short positions through the dissemination of aggregated information reported on new, stand-alone, Proposed Form SHO. The information reported on Proposed Form SHO would provide investors, market participants, and the Commission with short sale data that supplements what is currently available, free or on a fee basis, from FINRA and most exchanges.[20] Proposed Rule 13f–2 and Proposed Form SHO would improve the utility of information regularly available to the Commission, and made available as appropriate to self-regulatory organizations (''SROs''), that could be used to examine market behavior and recreate significant market events. It would also increase information available to market participants and could assist in their understanding of the level of negative sentiment and the actions of short sellers collectively. While the primary focus of Proposed Rule 13f–2 and Proposed Form SHO is transparency, the Commission's regular access to the data reported on Proposed Form SHO would also bolster its oversight of short selling. In addition, Proposed Rule 205 and the Proposal to Amend CAT would enhance the information regularly available to the Commission and other regulators that could be used to oversee short selling and to reconstruct significant market events. In turn, the Commission's more accurate and timely reconstruction and response to market events could contribute to overall investor protections, particularly in times of increased market volatility.[21]

II. Background

A. Enhancing Short Sale Transparency

In recent years, market volatility associated with short selling has brought heightened attention to the difference in long and short position reporting requirements, and, more generally, the lack of transparency into the circumstances surrounding short sale transactions.[22] The Commission has

[16] *See generally* Part VIII.D.1 (discussing how the Commission could have used the data provided under the Proposals to address market events such as the recent market volatility associated with meme stocks, and how the data provided under the Proposals could have aided the Commission in examining that market event).

[17] *See generally infr*a Part VIII.C.4 (discussing existing short selling data).

[18] *See generally infra* Parts VIII.B and VIII.C.4.iv (discussing challenges of extracting short sale information—*e.g.,* to estimate positions and to track how those positions change over time—from CAT).

[19] *See generally infra* Parts VIII.C.5 and VIII.F (discussing the impact of copycat trading strategies on competition).

[20] *See infra* Parts II.B and VIII.C.4 (discussing short sale data that is currently available and how that compares to the data to be reported on Proposed Form SHO).

[21] *See infra* Part VIII.D.1.

[22] *See, e.g.,* Letter from Elizabeth King, Corporate Secretary, NYSE Group, and James M. Cudahy, President and CEO, National Investor Relations Institute (Oct. 7, 2015, Petition 4–689) (stating that rulemaking under 929X ''provides an opportunity to implement meaningful public disclosure standards for short-sale activity, consistent with that currently required for institutional investment managers under Section 13(f) of the Exchange Act for long position reporting''), *available at https://www.sec.gov/rules/petitions/2015/petn4-689.pdf* [hereinafter ''NYSE Petition'']; Letter from Edward S. Knight, Executive Vice President, General Counsel and Chief Regulatory Officer, NASDAQ (Dec. 7, 2015, Petition 4–691) (requesting that the Commission ''take swift action to promulgate rules to require public disclosure by investors of short positions in parity with the disclosure regime applicable to long positions''), *available at https://www.sec.gov/rules/petitions/2015/petn4-691.pdf*

received requests to increase transparency into short sale related activity through the adoption of reporting requirements similar to those currently required by holders of long positions above certain thresholds.[23]

As noted above, Section 13(f)(2) requires the Commission to prescribe rules to make certain short sale data publicly available no less frequently than monthly. After carefully considering the possible economic effects of various approaches, the Commission believes that publication of aggregated gross short position data of certain Managers, and certain related activity data, as discussed in more detail below, would provide valuable transparency to market participants and regulators.[24] The Commission believes that the data resulting from Proposed Rule 13f–2 would help to provide valuable context to overall short position data currently available by distinguishing directional short selling of Managers from short sale activity effected pursuant to hedging as well as that of market makers and liquidity providers.[25] In addition, the Commission believes that the data would provide regulators with a more complete picture of significant market events by shedding additional light on the potential role of short selling activity.[26]

In determining the proposed reporting requirements under Proposed Rule 13f–2 and Proposed Form SHO, the Commission is mindful of concerns that certain short selling activity can be carried out pursuant to potentially abusive or manipulative schemes. For instance, market manipulators may seek to spread false information about an issuer whose stock they sold short in order to profit from a resulting decline in the stock's price.[27] The Commission has previously noted various other forms of manipulation that can be advanced by short sellers to illegally manipulate stock prices, such as ''bear raids.'' [28] As discussed below, greater transparency into the activities of Managers holding large short positions in a security could help regulators' oversight of short selling and deter these and other types of manipulative short selling campaigns potentially by alerting regulators to suspicious activity.[29]

B. Existing Short Sale Data

There are currently multiple sources of public and nonpublic data related to short sales.[30] FINRA and most exchanges collect and publish daily aggregate short sale volume data, and on a one month delayed basis publish information regarding short sale transactions.[31] However, the Commission understands that some exchanges only make certain data available for a fee. In addition, FINRA collects and aggregates short interest data [32] from broker-dealer member firms, by security, twice each month.[33]

[hereinafter ''NASDAQ Petition'']. *See also* Letter from E. Carter Esham, Executive Vice President, Emerging Companies, Biotechnology Innovation Organization (BIO) (Mar. 11, 2016) (applauding reforms to the short disclosure framework proposed in the NASDAQ Petition and in the NYSE Petition and advocating for the promulgation of rules to ensure parity between public disclosures required of investors taking long and short positions), *available at https://www.sec.gov/comments/4-691/4691-5.pdf;* Letter from Andrew D. Demott, Jr., Chief Operating Officer, Superior Uniform Group (supporting NASDAQ Petition and advocating adoption of disclosure requirements for short sellers), *available at https://www.sec.gov/comments/4-691/4691-10.pdf.* Developments in the market with regard to ''meme'' stocks in early 2021, some of which were widely reported as involving large short sellers, also highlighted a need for more consistent and consolidated short sale information. *See, e.g.,* Robert Smith, Laurence Fletcher, Madison Darbyshire, Eric Platt and Hannah Murphy, *'Short squeeze' spreads as day traders hunt next GameStop,* Fin. Times (Jan. 27, 2021), *available at https://www.ft.com/content/acc1dbfe-80a4-4b63-90dd-05f27f21ceb2; Are ''meme stocks'' harmless fun, or a threat to the financial old guard?,* Economist (July 6, 2021). *See also* Sharon Nunn and Adam Kulam, *Short-Selling Restrictions During Covid–19* (Jan. 12, 2021), *available at https://som.yale.edu/story/2021/short-selling-restrictions-during-covid-19* for a discussion of global short selling regulatory responses to the Covid–19 pandemic.

[23] *See, e.g.,* NYSE Petition and NASDAQ Petition, *supra* note 22. *See also* Final Report of the 2021 SEC Government-Business Forum on Small Business Capital Formation (May 2021), *available at https://www.sec.gov/files/2021_OASB_Annual_Forum_Report_FINAL_508.pdf* (requesting the Commission act to increase the transparency of short selling activities).

[24] *See infra* Part VIII.D (stating that Proposed Rule 13f–2, in conjunction with Proposed Rule 205 and the Proposal to Amend CAT, could help to advance the policy goal of investor protection by deterring market manipulation, and aid regulators in reconstructing significant market events and observing systemic risks).

[25] *See infra* Part VIII.C, VIII.D.

[26] *See infra* Part VIII.D.1 (stating that ''because short positions often take some time to create, the Commission could have attempted to quickly identify individual short sellers with large short positions in the various meme stocks in January 2021 based on the most recent reports; then the Commission could have used the enhanced CAT data to understand how these short sellers traded during the heightened volatility.'').

[27] *See infra* Part VIII.D.1 (stating that ''[i]n 'short and distort' strategies, which are illegal, the goal of manipulators is to first short a stock and then engage in a campaign to spread unverified bad news about the stock with the objective of panicking other investors into selling their stock in order to drive the price down''; stating further that ''[i]f successful, the scheme can drive down the price, allowing the manipulators to profit when they 'buy-to-cover' their short position at the reduced price.''). *See also,* John D. Finnerty, *Short Selling, Death Spiral Convertibles, and the Profitability of Stock Manipulation,* SSRN (2005) at n.8, *available at https://www.sec.gov/comments/s7-08-08/s70808-318.pdf* (stating that the posting of ''false notices on electronic bulletin boards in internet chat rooms is an example of the type of manipulative behavior that is difficult for regulators to monitor'').

[28] *Proposed Rule: Short Sales,* Exchange Act Release No. 48709, (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003), *available at https://www.sec.gov/rules/proposed/34-48709.htm* (stating that ''[a]lthough short selling serves useful market purposes, it also may be used to illegally manipulate stock prices. One example is the 'bear raid' where an equity security is sold short in an effort to drive down the price of the security by creating an imbalance of sell-side interest. Further, unrestricted short selling can exacerbate a declining market in a security by increasing pressure from the sell-side, eliminating bids, and causing a further reduction in the price of a security by creating an appearance that the security price is falling for fundamental reasons.'').

[29] *See* Part VIII.D.1 (stating that ''if a short and distort campaign is suspected, then detecting this behavior via the activity and positions data in Proposed Form SHO would be easier than it would be using current data. Short and distort campaigns are more likely to occur in stocks with lower market capitalizations with less public information. Consequently, among these stocks it may not, in dollar terms, take a very large short position to reach the 2.5% threshold in securities of smaller reporting issuers or the $500,000 threshold in securities of non-reporting issuers to report on Proposed Form SHO. As a result, it is likely that an entity engaging in such a practice would be required to report Proposed Form SHO data. Consequently, if short and distort type behavior were to be suspected, then the Commission would be more likely to identify individuals with large short positions and could thus quickly focus any inquiries on entities in an economic position to potentially profit from manipulation.'').

[30] Additionally, the Commission publishes on its website fail to deliver data, which can result from both long and short sales, twice per month for all equity securities. Securities and Exchange Commission, Fails-to-Deliver Data, *available at https://www.sec.gov/data/foiadocsfailsdatahtm.* Further, the CAT created pursuant to Rule 613 of Regulation NMS gives regulators, including the Commission, access to comprehensive information regarding the lifecycle of a trade—from origination, including an order's mark (*i.e.,* ''long,'' ''short,'' or ''short exempt''), through execution and allocation. *See* Part VI. Notably, CAT is currently structured to collect information, but not to disseminate it.

[31] This data is transaction by transaction for each security without identification of the broker-dealer or short seller.

[32] *See Short Interest — What It Is, What It Is Not,* FINRA Inv'r Insights (Apr. 12, 2021), *available at https://www.finra.org/investors/insights/short-interest* (stating that '''short interest' is a snapshot of the total open short positions in a security existing on the books and records of brokerage firms on a given date. Short interest data is collected for all stocks—both those that are listed and traded on an exchange and those that are traded over-the-counter (OTC). FINRA and U.S. exchange rules require that brokerage firms report short interest data to FINRA on a per-security basis for all customer and proprietary firm accounts twice a month, around the middle of the month and again at the end of each month.'').

[33] *See infra* Part VIII.C.4.i. FINRA recently sought comment on a variety of potential enhancements to its short interest position program. *See* FINRA Regulatory Notice 21–19 (June 2021), *available at https://www.finra.org/rules-guidance/notices/21-19.* Any such changes to FINRA rules would be filed with the Commission and published for notice and public comment, pursuant to Exchange Act Section 19(b) and Rule 19b–4 thereunder. *See also* FINRA Rule 4560. Short Interest Reporting, *available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/4560* (requiring FINRA member firms to maintain a record of total ''short'' positions in all

Continued

FINRA provides this aggregated short interest data to the appropriate listing exchange for publication, some of which charge a fee for access to the data. For over-the-counter (''OTC'') securities, which are not listed on an exchange, FINRA publishes the aggregated short interest data itself.[34] FINRA's aggregation of the short interest data for each security does not disclose the identity of reporting market participants or the size of any individual short position.

C. Prior Nonpublic Short Sale Reporting by Certain Institutional Investment Managers to the Commission

In October 2008, the Commission adopted interim temporary Rule 10a–3T, which required certain institutional investment managers to file weekly nonpublic reports with the Commission on Form SH regarding their short sales and positions in Section 13(f) securities, other than options.[35] Rule 10a–3T required reporting of short positions that were either greater than 0.25% of shares outstanding or $10 million in fair market value. This temporary rule was adopted in the wake of the 2008 financial crisis in response to concerns about high levels of volatility associated with short selling and was specifically intended to provide the Commission with information to evaluate whether its short selling regulations were working as intended.[36] Rule 10a–3T remained in effect through July 2009, at which time the Commission stated that it and its staff were working with several SROs to make publicly available certain information related to short sale activity, such as short sale volume and transaction data.[37]

Forms SH were nonpublic filings. The Commission's determination to maintain the confidentiality of the information disclosed on Form SH was based in part on the concern that requiring public disclosure may have had the unintended consequence of giving rise to imitative short selling, thereby exacerbating already extreme levels of market volatility observed during the 2008 financial crisis.[38] The Commission also stated that implementing a nonpublic, rather than public, disclosure requirement would help to prevent the potential for sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets.[39] Moreover, the Commission stated at the time that requiring nonpublic submission of the form may help prevent artificial volatility in securities as well as further downward swings that are caused by short selling while also providing the Commission with valuable information to combat market manipulation.[40] Just before interim temporary Rule 10a–3T was set to expire in August 2009, the Commission stated that it would continue to examine whether additional measures are needed to further enhance market quality and transparency, as well as address short selling abuses.[41]

D. Petitions and Commentary Regarding Short Position Disclosure

NASDAQ, NYSE, and the National Investor Relations Institute, have previously petitioned the Commission requesting that, pursuant to DFA Section 929X, it require disclosure of individual short positions similar to the disclosures required under Section 13(f)(1) or Regulations 13D and 13G for long-position reporting.[42] The petitions also request that ''short position'' or ''short interest'' be interpreted broadly to capture not only traditional short sales but also derivative and other transactions having the same economic impact. Among these petitioners' concerns is that the lack of public disclosure of individual short positions may facilitate accumulations of significant positions in an issuer's securities and potentially compromise investors' ability to accurately evaluate market movements in those securities.[43] They further argue that the benefits associated with requiring individual, public disclosure of short selling would include allowing investors to more accurately evaluate market movements and make more informed investment decisions, reducing manipulative conduct, increasing investor confidence, and improving issuers' ability to engage with short sellers.

While some market participants have noted instances when public announcements by short sellers have aided the market in ultimately discovering the truth behind fraudulent activity,[44] critics of that position have countered with ways short sellers may unfairly harm issuers that are not engaged in fraudulent activity.[45] Other such critics of short selling have posited that issuers may be unduly harmed [46] even when short sellers suffer through normal market forces.[47]

In response to requests for comment on the short sale reporting study required by Section 417(a)(2) of DFA,[48]

customer and proprietary firm accounts and to regularly report such information to FINRA).

[34] For stocks traded OTC, FINRA collects and publishes equity short interest information free on its Over-the-Counter Equities page, *available at https://otce.finra.org/otce/equityShortInterest.*

[35] *Disclosure of Short Sales and Short Positions by Institutional Investment Managers,* Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008). The rule extended the reporting requirements established by the Commission's Emergency Orders dated September 18, 2008, September 21, 2008, and October 2, 2008, with some modifications. *See Emergency Order Pursuant to Section 12(k)(2) of the Securities and Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments,* Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175 (Sept. 24, 2008); *Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments,* Exchange Act Release No. 58591A (Sept. 21, 2008), 73 FR 55557 (Sept. 25, 2008) (amending the September 18, 2008 Emergency Order (''Order'') to clarify certain technical issues and when the information filed by the institutional investment managers on a nonpublic basis would be made public by the Commission on a delayed basis); *Amendment to Order and Order Extending Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments,* Exchange Act Release No. 58724 (Oct. 2, 2008), 73 FR 58987 (Oct. 8, 2008) (extending effectiveness of the Order through October 17, 2008, and stating that the Forms SH filed under the Order would remain nonpublic to the extent permitted by law).

[36] *See Disclosure of Short Sales and Short Positions by Institutional Investment Managers,* Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

[37] Press Release, Securities and Exchange Commission, *SEC Takes Steps to Curtail Abusive Short Sales and Increase Market Transparency* (July 27, 2009), *available at https://www.sec.gov/news/press/2009/2009-172.htm* (stating that the Commission and its staff were working with several SROs to make certain short sale volume and transaction data available through SRO websites).

[38] *Amendment to Order and Order Extending Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments,* Exchange Act Release No. 58724 (Oct. 2, 2008), 73 FR 58987 (Oct. 8, 2008).

[39] *Id.* at 58987.

[40] *Id.*

[41] *See supra* note 37.

[42] *See supra* note 22.

[43] *Id.*

[44] *See, e.g.,* Jane Lewis, *Jim Chanos: the short-seller who called Enron,* MoneyWeek (Sept. 28, 2018), *available at https://moneyweek.com/495688/jim-chanos-the-short-seller-who-called-enronarticle.*

[45] *See, e.g.,* Duncan Lamont, *GameStop: the ethics of short sellers,* Schroders (Jan. 29, 2021), *available at https://www.schroders.com/en/insights/economics/are-short-sellers-ethical/;* Ariel D. Multak, *The Big Patent Short: Hedge Fund Challenges to Pharmaceutical Patents and the Need for Financial Regulation,* 23 Fordham J. Corp. & Fin. L. 301 (2017), *available at https://news.law.fordham.edu/jcfl/wp-content/uploads/sites/5/2018/01/Multak-Note.pdf.*

[46] *See, e.g.,* Tom Brennan, *How Short-Sellers Almost Destroyed U.S. Banking,* CNBC (Aug. 5, 2010), *available at https://www.cnbc.com/id/28239960.*

[47] *See, e.g.,* Alex Rosenberg, *When shorting goes wrong: Zulily crushes the bears,* CNBC (Aug. 18, 2015), *available at https://www.cnbc.com/2015/08/17/when-shorting-goes-wrong-zulily-crushes-the-bears.html.*

[48] *Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2),* Exchange Act Release No. 64383 (May 3, 2011), 76 FR 26787 (May 9, 2011). *See also* DERA 417(a)(2) Study, *supra* note

one commenter stated that identification of a market participant that has engaged in a short sale may have the unintended consequence of exposing investors to the risk of short squeezes.[49] This commenter also maintained that individual public disclosure could chill short selling and thereby deny the marketplace certain resulting benefits, such as market liquidity, and pricing efficiency.[50]

Design of Proposals. As discussed more fully throughout the release, the Commission believes that Proposed Rule 13f–2 appropriately balances these competing interests. Proposed Rule 13f–2 would result in the publication of certain short sale related data, which would provide additional transparency to market participants, but data would be aggregated across all reporting Managers for each reported equity security prior to publication. The Commission believes that publicly disclosing the identity of individual reporting Managers may not currently be necessary to advance the policy goal of increasing public transparency into short selling activity, and that aggregating across reporting Managers would help safeguard against the concerns noted above related to retaliation against short sellers, including short squeezes, and the potential chilling effect that such public disclosure may have on short selling. Further, by establishing minimum reporting thresholds, Proposed Rule 13f–2 would apply only to Managers with large gross short positions in a security, and would not generally apply to market participants that do not carry large overnight gross short positions in equity securities.

Managers that meet a specified reporting threshold, as discussed below, would be required to file Proposed Form SHO with the Commission within 14 calendar days after the end of the calendar month. The Commission would then publish aggregated information derived from data reported on Proposed Form SHO. The Commission estimates that it will publish such aggregated information within one month after the end of the reporting calendar month —*e.g.,* for data reported by Managers on Proposed Form SHO for the month of January, the Commission would expect to publish aggregated information derived from such data no later than the last day of February. This additional time prior to publication of data by the Commission following receipt of the monthly Proposed Form SHO reports would be used to aggregate the data received from the reporting Managers. At this time, the Commission does not intend to verify the accuracy of the data reported by Managers, but may consider doing so in the future after assessing whether such verification would be useful or necessary to enhance the integrity of the data.[51] The additional delay prior to publication of the aggregated data would also help to reduce the risk of imitative trading activity by market participants and help to protect reporting Managers' proprietary trading strategies.[52]

As discussed throughout this release, the Commission believes that, by limiting the reporting requirements to positions exceeding a reporting threshold and by publishing data on an aggregated and delayed basis, the structure of Proposed Rule 13f–2 and the information required to be reported on Proposed Form SHO would likely mitigate many potential negative effects on the market.

III. Proposed Rule 13f–2 and Proposed Form SHO

A. Proposed Form SHO Filing Requirement Through EDGAR

Proposed Rule 13f–2 is designed to provide greater transparency through the publication of certain short sale related data to investors and other market participants by requiring a Manager to file a report in a structured data language in two information tables on Proposed Form SHO, in accordance with the form's instructions (attached below). Managers would file Proposed Form SHO with the Commission via the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR'') in an eXtensible Markup Language (''XML'') specific to Proposed Form SHO (''custom XML,'' here ''Proposed Form SHO-specific XML''). Managers would have two ways to file Proposed Form SHO or any amended Proposed Form SHO with the Commission. A Manager could use a fillable web form the Commission would provide on EDGAR to input Proposed Form SHO disclosures, which EDGAR would convert to Proposed Form SHO-specific XML, or, alternatively, a Manager could use its own software tool to file Proposed Form SHO to EDGAR directly in Proposed Form SHO-specific XML.

A Manager would be required to file Proposed Form SHO with the Commission within 14 calendar days after the end of each calendar month with regard to each equity security over which the Manager and all accounts over which the Manager (or any person under the Manager's control) has investment discretion [53] collectively meet or exceed a quantitative reporting threshold. Specifically, a Manager must file a Proposed Form SHO report:

- With regard to any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act [54] or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act [55] (a ''reporting company issuer'') in which the Manager meets or exceeds either (1) a gross short position in the equity security with a US dollar value of $10 million or more at the close of regular trading hours [56] on any settlement date during the calendar month, or (2) a monthly average gross short position [57] as a percentage of shares outstanding in the equity security of 2.5% or more (''Threshold A''); and
- with regard to any equity security of an issuer that is not a reporting company issuer as described above (a

6. The DERA 417(a)(2) Study was a study conducted by Commission staff in the Division of Economic and Risk Analysis analyzing the feasibility, costs, and benefits of *real-time* reporting of short positions in publicly listed securities.

[49] *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association (June 22, 2011) (''2011 MFA Letter''), *available at https://www.sec.gov/comments/4-627/4627-137.pdf; see also* Letter from Matthew Newell, Associate General Counsel, Managed Funds Association (Sept. 6, 2019), *available at https://www.sec.gov/comments/s7-26-18/s72618-6082119-191807.pdf.*

[50] In this regard, the commenter in the 2011 MFA Letter stated that individual public disclosure would cause potential short sellers to either refrain from or minimize engaging in short sale transactions, including hedging activity, to avoid triggering any threshold for requiring individual public disclosure. The commenter further stated that public disclosure of individual short positions could be misleading to investors (stating that investors frequently short a stock for portfolio risk management purposes) and could potentially enable market participants to reverse engineer a reporting firm's trading strategies. In addition, the commenter stated that individual public disclosure could expose market participants to the risk of a ''short squeeze,'' which may deter investors from engaging in short selling more generally. 2011 MFA Letter, *supra* note 49.

[51] *See infra* Part III.B.4 for a discussion of how technical errors are to be addressed in filing Proposed Form SHO with the Commission.

[52] *See generally infra* Parts VIII.C.5 and VIII.F (discussing ''copycat trading'').

[53] For purposes of Proposed Rule 13f–2, the term ''investment discretion'' has the same meaning as in Rule 13f–1(b) under the Exchange Act. 17 CFR 240.13f–1(b). Proposed Rule 13f–2(b)(2).

[54] 15 U.S.C. 78l.

[55] 15 U.S.C. 78o(d).

[56] For purposes of Proposed Rule 13f–2 and Proposed Form SHO, the term ''regular trading hours'' would have the same meaning as in Rule 600(b)(77) under the Exchange Act. *See, e.g.,* Proposed Rule 13f–2(b)(5).

[57] For purposes of Proposed Rule 13f–2, the term ''gross short position'' means the number of shares of the reportable equity security that are held short, without inclusion of any offsetting economic positions (including shares of the reportable equity security or derivatives of such security). Proposed Rule 13f–2(b)(4).

''non-reporting company issuer'') in which the Manager meets or exceeds a gross short position in the equity security with a US dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month (''Threshold B'').

Threshold A and Threshold B are discussed further in Part III.D below and are referred to herein collectively as the ''Reporting Thresholds'' (each a ''Reporting Threshold''). For each equity security for which a Manager meets or exceeds a Reporting Threshold, such Manager, identifying itself using its name and active Legal Entity Identifier (''LEI''), if available,[58] would be required to report information that is aggregated across accounts over which the Manager, or any person under the Manager's control, has investment discretion. If a Manager does not have an active LEI, such Manager would file Proposed Form SHO using only its name as registered with the Commission to identify itself.

Managers that meet a Reporting Threshold would be required to file Proposed Form SHO with the Commission via EDGAR within 14 calendar days after the end of the calendar month. Section 13(f)(2) requires that public disclosure of certain short sale information at a minimum shall occur every month. The Commission believes that 14 calendar days after the end of each month provides sufficient time for Managers that meet a Reporting Threshold to assemble, review, and file the required information on Proposed Form SHO. Further, the Commission believes that providing Managers with a reasonable period of time to file complete and accurate short sale related information in the first instance would reduce the need for Managers to file amendments to Proposed Form SHO, as discussed below.

Consistent with Regulation SHO, Proposed Rule 13f–2 would apply to equity securities.[59] As such, the Commission believes that the short sale related data that would be published by the Commission under Proposed Rule 13f–2 would provide additional context to market participants regarding equity securities that are subject to the requirements of Regulation SHO.

For purposes of Proposed Rule 13f–2, the term ''investment discretion'' has the same meaning as in Rule 13f–1(b) under the Exchange Act.[60] Rule 13f–1(b)'s definition is comprehensive in that it covers all accounts over which the Manager, or any person under the Manager's control, has investment discretion. This same definition of investment discretion was used by the Commission in adopting interim temporary Rule 10a–3T in 2008, which required certain Managers to file weekly nonpublic reports with the Commission on Form SH regarding short sales and positions,[61] and is currently used for Form 13F ''long'' position reporting by certain Managers. Because Proposed Rule 13f–2 is designed to provide greater transparency to investors and other market participants through the publication of certain short sale related data, the Commission believes that using the same comprehensive definition of investment discretion for Manager reporting under Proposed Rule 13f–2 is likewise appropriate. In addition, Managers that would be filing reports on Proposed Form SHO are likely experienced with reporting on Form 13F using this same definition. As discussed above, Proposed Rule 13f–2 is designed to address the requirements of Section 13(f)(2) by offering increased transparency into the activities of certain Managers with large short positions. As such, information reported by a Manager should include all accounts over which such Manager has investment discretion.

Proposed Rule 13f–2 would require that a Manager calculate its ''gross short position'' in an equity security in determining whether it meets a Reporting Threshold. Under Proposed Rule 13f–2, ''gross short position'' would mean the number of shares of the equity security that are held short, without inclusion of any offsetting economic positions, including shares of the equity security or derivatives of such equity security. The Manager shall report its gross short position in an equity security without offsetting such gross short position with ''long'' shares of the equity security or economically equivalent long positions obtained through derivatives of the equity security. A Manager's gross short position in a security is distinct from its net short position in such security, and the Commission believes that gross short position information provides a more complete view of a Manager's short exposure, especially if coupled with the hedging information that the Commission is proposing Managers report on Proposed Form SHO, as discussed below. Requiring reporting of gross short positions would also likely result in more consistent reporting among Managers. Specifically, the Commission is concerned that using net short positions could result in Managers using varying approaches in determining what ''long'' positions, including equivalent ''long'' positions through derivatives, are appropriate to offset against their gross short position in determining whether the Manager meets a Reporting Threshold in the first instance. Consequently, the Commission believes that using a net short position could result in different reporting results for otherwise similarly situated Managers in terms of a gross short position in the equity security.

The Commission is proposing required Manager disclosures that are significantly different from currently available data and that would be useful to both market participants and regulators, with a focus on addressing data limitations exposed by the market volatility in January 2021.

B. Proposed Form SHO

1. Filing Proposed Form SHO Reports

Proposed Form SHO is entitled ''Information required of institutional investment managers pursuant to Section 13(f)(2) of the Securities Exchange Act of 1934 and rules thereunder.'' Managers would use Proposed Form SHO for reports to the Commission required by Proposed Rule 13f–2. A Manager would file a report on Proposed Form SHO with the Commission within 14 calendar days after the end of each calendar month with regard to each equity security in which the Manager meets or exceeds a Reporting Threshold.

Pursuant to Proposed Rule 13f–2 and Proposed Form SHO, to determine whether the dollar value threshold described in the first prong of Threshold A—a gross short position in an equity security of a reporting company issuer (as described above) with a US dollar value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month—is met, a Manager shall determine its end of day gross short position in the equity security on each settlement date during the calendar month and multiply that figure by the

[58] LEI is a unique global identifier for legal entities participating in financial transactions that is currently used in regulatory reporting to financial regulators, including the Commission.

[59] Regulation SHO applies to equity securities, both exchange-listed and over-the-counter, as defined in Section 3(a)(11) of the Exchange Act and Rule 3a11–1 thereunder. *See* Regulation SHO Adopting Release, *supra* note 4.

[60] 17 CFR 240.13f–1(b). Rule 13f–1 is entitled ''Reporting by institutional investment managers of information with respect to accounts over which they exercise investment discretion.''

[61] *See supra* Part II.C.

closing price at the close of regular trading hours on the settlement date.

To determine whether the second prong of Threshold A—2.5% or higher monthly average gross short position as a percentage of shares outstanding in the equity security—is met, the Manager shall (a) identify its gross short position (as defined in Proposed Rule 13f–2) in the equity security at the close of each settlement date during the calendar month of the reporting period, and divide that figure by the number of shares outstanding in such security at the close of that settlement date, then (b) add together the daily percentages during the calendar month as determined in (a) and divide the resulting total by the number of settlement dates during the calendar month of the reporting period. The number of shares outstanding of the security for which information is being reported shall be determined by reference to an issuer's most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission.

To determine whether the dollar value threshold described in Threshold B—a gross short position in an equity security of a non-reporting company issuer (as described above) with a US dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month—is met, a Manager shall determine its end of day gross short position in the equity security on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date. In circumstances where such closing price is not available, the Manager would be required to use the price at which it last purchased or sold any share of that security in determining whether Threshold B is met.

The rules to prevent duplicative reporting of Proposed Form SHO are modeled after those in Form 13F.[62] More specifically, if two or more Managers, each of which is required by Proposed Rule 13f–2 to file Proposed Form SHO for the reporting period, exercise investment discretion with respect to the same securities, only one such Manager must report the information in its report on Proposed Form SHO. If a Manager has information that is required to be reported on Proposed Form SHO and such information is reported by another Manager (or Managers), such Manager must identify the Manager(s) reporting on its behalf in the manner described in Special Instruction 5 to the Proposed Form SHO instructions. Such information would be reported by Managers on the ''Cover Page,'' as discussed further below. Duplicative reporting could result in unnecessary costs to Managers, and could make the aggregated data published by the Commission less accurate.

The Commission believes that requiring Proposed Form SHO to be reported via EDGAR would enhance the accessibility, usability, and quality of the Proposed Form SHO disclosures for the Commission. Proposed Rule 13f–2 and Proposed Form SHO would improve the quality and scope of the information regularly available for the Commission's use in examining market behavior and recreating significant market events. In addition, Proposed Rule 13f–2 and Proposed Form SHO would expand the scope of information available to market participants and could thereby assist in their understanding of the level of negative sentiment and the actions of short sellers collectively. While the primary focus of Proposed Rule 13f–2 and Proposed Form SHO is transparency, the Commission's regular access to the data reported on Proposed Form SHO would also bolster its oversight of short selling. The Commission's ability to more accurately and timely reconstruct and respond to market events could enhance investor protections, particularly in times of increased market volatility.[63]

Reporting via EDGAR would allow the Commission to download the Proposed Form SHO disclosures directly, facilitating efficient access, organization, and evaluation of the reported information, thereby allowing the Commission to more effectively examine market behavior, recreate significant market events, and further bolster its oversight of short selling activity.

The Commission believes that requiring Proposed Form SHO to be filed in Proposed Form SHO-specific XML, a structured machine-readable data language, would facilitate more thorough review and analysis of the reported short sale disclosures by the Commission, increasing the efficiency and effectiveness of the Commission's understanding of short selling and systemic risk. Additionally, most Managers have experience filing EDGAR forms that use similar EDGAR Form-specific XML-based data languages, such as Form 13F.[64]

2. Confidential Treatment

The instructions to Proposed Form SHO expressly provide that all information that would reveal the identity of a Manager filing a Proposed Form SHO report with the Commission is deemed subject to a confidential treatment request under Rule 24b–2 (17 CFR 240.24b–2). The Commission currently plans to publish only aggregated data derived from information provided in Proposed Form SHO reports. Accordingly, Proposed Form SHO, by its terms, ensures that information reported on the form that could reveal the identity of the reporting Manager will be deemed subject to a confidential treatment request. Pursuant to Section 13(f) of the Exchange Act, the Commission may prevent or delay public disclosure of all other information reported on Proposed Form SHO in accordance with FOIA, Section 13(f)(4)–(5), Rule 24b–2(b) under the Exchange Act, and any other applicable law.[65] The Commission believes that, because the Commission currently plans to publish only aggregated data derived from information reported on Proposed Form SHO, it would be unlikely to grant requests for confidential treatment of the information from which the aggregated data is derived. While it is possible a person may be able to reverse engineer data in a situation where only one person was selling short, especially where the short seller has publicly disclosed that they have a short position in a specific security, the Commission anticipates that many potential negative effects on the market or that short seller would likely be mitigated by the delay in publication of the aggregated data. Further, the Commission believes that granting a request from a Manager that the data it provides on a Proposed Form SHO report be excluded from the aggregated data published by the Commission could affect the integrity of the data by limiting or possibly excluding relevant information. This likely would limit the usefulness of the information to the public. For these reasons, the Commission believes that, on balance, the public's need for the

[62] *See* ''Rules to Prevent Duplicative Reporting'' in the ''General Instructions'' of Form 13F, *available at https://www.sec.gov/pdf/form13f.pdf.*

[63] *See infra* Part VIII.D.1.

[64] *See* Form 13F, *available at https://www.sec.gov/pdf/form13f.pdf.*

[65] Any requests for confidential treatment of the information reported on Proposed Form SHO should be made in accordance with Rule 24b–2 under the Exchange Act (17 CFR 240.24b–2), should be filed electronically in accordance with proposed Rule 24b–2(i) and Rule 101(d) of Regulation S–T (17 CFR 232.101(d)), and should provide enough factual support in the request to enable the Commission to make an informed judgment as to the merits of the request.

aggregated data the Commission would publish likely would justify any potential harm that disclosing such aggregated disclosure would impose on the Manager requesting confidential treatment.

3. Proposed Form SHO Contents

Proposed Form SHO consists of two parts: (1) The Cover Page, and (2) the Information Tables.

On the Cover Page—

- The Manager shall report certain basic information, including its name, mailing address, business telephone and facsimile numbers, as well as the name, title, business telephone and facsimile numbers of the Manager's contact employee for the Proposed Form SHO report; and the date the report is filed. The Manager will also provide its active LEI, if it has one. The Commission believes that this basic information should be included to identify the reporting Manager and the calendar month for which the Manager is reporting.
- The Manager shall identify the calendar month (using the last settlement date of the calendar month) for which the Manager is reporting. The date should name the month, and express the day and year in Arabic numerals, with the year being a four-digit numeral (*e.g.,* 2022).
- The Manager filing the report will include the representation that ''all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.''
- The reporting Manager shall designate the report type for the Proposed Form SHO by checking the appropriate box in the ''Report Type'' section of the Cover Page, and include, where applicable, the name and active LEI of each other Manager reporting for this Manager. If the other Manager's active LEI is not available to the reporting Manager, the reporting Manager shall include only the name of the other Manager as registered with the Commission. This information will provide the Commission with a summary of the nature and scope of the information that the Manager is reporting for the calendar month, as well as identify other reporting Managers, if applicable.
  - If all of the information that a Manager is required by Proposed Rule 13f–2 to report on Proposed Form SHO is reported by another Manager (or Managers), the Manager shall check the box for Report Type ''FORM SHO NOTICE,'' include on the Cover Page the name and active LEI (if available) of each of the Other Managers Reporting for this Manager and omit the Information Tables.
  - If all of the information that a Manager is required by Proposed Rule 13f–2 to report on Proposed Form SHO is reported in the report filed by the Manager, the Manager shall check the box for Report Type ''FORM SHO ENTRIES REPORT,'' omit from the Cover Page the name and active LEI of each other Manager reporting for this Manager, and include the Information Tables.
  - If only a part of the information that a Manager is required by Proposed Rule 13f–2 to report on Proposed Form SHO is reported in the report filed by the Manager, the Manager shall check the box for Report Type ''FORM SHO COMBINATION REPORT,'' include on the Cover Page the name and active LEI of each of the Other Managers reporting for this Manager, if available, and include the Information Tables.
- If the Manager is filing the Proposed Form SHO report as an amendment, then the Manager must check the ''Amendment and Restatement'' box on the Cover Page, and enter the Amendment and Restatement number.[66] Each amendment must include a complete Cover Page and Information Tables. Amendments must be filed sequentially. This information will provide the Commission with a summary of the nature and scope of the information that a Manager is reporting for the calendar month.

In reporting information required on Information Tables 1 and 2, as discussed below, a Manager also must account for and report a gross short position in an ETF, and activity that results in the acquisition or sale of shares of the ETF resulting from call options exercises or assignments; put options exercises or assignments; tendered conversions; secondary offering transactions; or other activity, as discussed further below. However, for purposes of Proposed Form SHO reporting, a Manager, in determining its gross short position in an equity security, would not be required to consider short positions that the ETF holds in individual underlying equity securities that are part of the ETF basket. Not requiring the Manager to consider these short positions in the underlying equity securities should limit the burden to reporting Managers in determining whether such Manager meets a Reporting Threshold in such underlying equity securities, while not materially affecting the reported gross short position and short activity data.

Information Table 1: ''*Manager's Gross Short Position Information*''—The information being reported will include gross short position information regarding transactions that have settled during the calendar month being reported.

- In Column 1, a Manager shall enter the last day of the calendar month being reported by the Manager on which a trade settles (''settlement date''). This information will identify the month being reported by the Manager.
- In Column 2, a Manager shall enter the name of the issuer to identify the issuer of the equity security for which information is being reported.
- In Column 3, a Manager shall enter the issuer's active LEI, if the issuer has an active LEI. The LEI provides standardized information that will enable the Commission and market participants to more precisely identify the issuer of each equity security for which information is being reported.
- In Column 4, consistent with Section 13(f)(2), a Manager shall enter the title of the class of the equity security for which information is being reported.
- In Column 5, consistent with Section 13(f)(2), a Manager shall enter the nine (9) digit CUSIP number of the equity security for which information is being reported, if applicable.
- In Column 6, a Manager shall enter the twelve (12) character, alphanumeric Financial Instrument Global Identifier (''FIGI'')[67] of the equity security for which information is being reported, if a FIGI has been assigned. Like CUSIP, FIGI provides a methodology for identifying securities.
- In Column 7, a Manager shall enter the number of shares that represent the Manager's gross short position in the equity security for which information is being reported at the close of regular trading hours on the last settlement date of the calendar month of the reporting period. The term ''gross short position'' means the number of shares of the security for which information is being reported that are held short, without inclusion of any offsetting economic positions (including shares of the equity security for which information is being reported or derivatives of such security).
- In Column 8, a Manager shall enter the US dollar value of the shares reported in Column 7, rounded to the nearest dollar. A Manager shall report the corresponding dollar value of the

[66] *See infra* Part III.B.4.

[67] FIGI is a randomly assigned 12 character, alphanumeric ID that provides a standardized unique unambiguous identification framework for financial instruments across all asset classes and jurisdictions. It is open sourced, freely available, and non-proprietary.

reported gross short position by multiplying the number of shares of the security for which information is being reported by the closing price at the close of regular trading hours on the last settlement date of the calendar month. In circumstances where such closing price is not available, the Manager shall use the price at which it last purchased or sold any share of that security. This additional information regarding the dollar value of the reported short position will provide additional transparency and context to market participants and regulators.

• In Column 9, a Manager shall indicate whether the identified gross short position in Column 7 is fully hedged (''F''), partially hedged (''P''), or not hedged (''0'') at the close of the last settlement date of the calendar month of the reporting period. A Manager shall indicate that a reported gross short position in an equity security is ''fully hedged'' if the Manager also holds an offsetting position that reduces the risk of price fluctuations for its entire position in that equity security, for example, through ''delta'' hedging [68] (in which the Manager's reported gross short position is offset 1-for-1), or similar hedging strategies used by market participants. A Manager shall report that it is ''partially hedged'' if the Manager holds an offsetting position that is less than the identified price risk associated with the reported gross short position in that equity security. This additional hedging information would help to indicate whether the reported gross short position is directional or non-directional in nature. More specifically, a short position that is not hedged could be an indicator that the short seller has a negative view of the security, believes that the price of the equity security will decrease, and accepts the market risk related to its short position. A short position that is fully hedged could be an indicator that the short seller has a neutral or positive view of the security, and is engaged in hedging activity to protect against potential market risk. A short position that is partially hedged could be an indicator that the short seller has a negative, neutral, or positive view of the security. Whether the hedge itself is full, partial, or non-existent might provide further context to market participants regarding the short sellers' view of the equity security. The Commission believes that hedging information also can assist with distinguishing position trading, which typically has corresponding hedging activity, from other strategies such as arbitrage.

Information Table 2: ''*Daily Activity Affecting Manager's Gross Short Position During the Reporting Period*''— The Manager shall report the information required by the Proposed Form SHO instructions for each date during the reporting period on which a trade settles (settlement date) during the calendar month. The Commission believes that such daily activity information would provide market participants and regulators with additional context and transparency into whether, how, and when reported gross short positions in the reported equity security are being closed out (or alternatively, increased) as a result of the acquisition or sale of shares of the equity security resulting from call options exercises or assignments; put options exercises or assignments; tendered conversions; secondary offering transactions; and other activity. The Commission believes that such activity data would also assist the Commission in assessing systemic risk and in reconstructing unusual market events, including instances of extreme volatility.

• In Column 1, a Manager shall enter the date during the reporting period on which a trade settles for the activity reported. This will identify the settlement date activity being reported.

• In Column 2, a Manager shall enter the name of the issuer, consistent with Section 13(f)(2), to identify the issuer of the security for which information is being reported.

• In Column 3, a Manager shall enter the issuer's active LEI, if the issuer has an active LEI. The LEI provides standardized information that will enable the Commission and market participants to more precisely identify the issuer of each equity security for which information is being reported.

• In Column 4, consistent with Section 13(f)(2), a Manager shall enter the title of the class of the security for which information is being reported.

• In Column 5, consistent with Section 13(f)(2), a Manager shall enter the nine (9) digit CUSIP number of the equity security for which information is being reported, if applicable.

• In Column 6, a Manager shall enter the twelve (12) character, alphanumeric FIGI of the equity security for which information is being reported, if a FIGI has been assigned. Like CUSIP, FIGI provides a methodology for identifying securities.

• In Column 7, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the equity security for which information is being reported that resulted from short sales and settled on that date.

• In Column 8, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that were purchased to cover, in whole or in part, an existing short position in that security and settled on that date. This activity information will allow the Commission and other regulators to more quickly identify a potential ''short squeeze,'' which can be evidenced by short sellers closing out short positions by purchasing shares in the open market. If it appears that a short squeeze may have occurred through potential manipulative behavior involving short selling, the Commission could perform further analysis regarding the squeeze. Increased risk of detection may deter some market participants seeking to orchestrate a short squeeze.[69]

• In Column 9, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that are acquired in a call option exercise that reduces or closes a short position on that security and settled on that date. The exercise or assignment of an option position can reduce or close a short position in the underlying equity security.

• In Column 10, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that are sold in a put option exercise that creates or increases a short position on that security and settled on that date. Options can be used to create economic short exposure such that an exercise or assignment of an option could create or increase a short position in the underlying equity security.

• In Column 11, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that are sold in a call option assignment that creates or increases a short position on that security and settled on that date. Options can be used to create economic short exposure such that an exercise or assignment of an option could create or increase a short position in the underlying equity security.

• In Column 12, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that are acquired in a put option assignment that reduces or closes a short position on that security and

[68] *See* Brandon Renfro, *What is Delta Hedging?,* The Balance (Nov. 4, 2021), *available at https://www.thebalance.com/what-is-delta-hedging-5207735.*

[69] *See infra* Part VIII.D.1.

settled on that date. The exercise or assignment of an option position can reduce or close a short position in the underlying equity security.

• In Column 13, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that are acquired as a result of tendered conversions that reduce or close a short position on that security and settled on that date. Holders of convertible debt often hold short positions to hedge their convertible position. When the shares of the convertible debt are converted, they can reduce or close a short position in the equity security.

• In Column 14, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that were obtained through a secondary offering transaction that reduces or closes a short position on that security and settled on that date.[70] A secondary offering transaction, sometimes referred to as a ''seasoned'' offering, occurs when a company sells newly created shares to the market, at a time subsequent to the company's initial public offering, or ''IPO.'' Purchasing securities in a secondary offering can reduce or close a short position in the equity security.

• In Column 15, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that resulted from other activity not previously reported in Information Table 2 that creates or increases a short position on that security and settled on that date. Other activity to be reported includes, but is not limited to, shares resulting from ETF creation or redemption activity.

• In Column 16, for the settlement date set forth in Column 1, a Manager shall enter the number of shares of the security for which information is being reported that resulted from other activity not previously reported on Information Table 2 that reduces or closes a short position on that security and settled on that date. Other activity to be reported includes, but is not limited to, shares resulting from ETF creation or redemption activity.

The Commission believes that the information in Columns 9, 12, 13, 14, and 16 is useful in providing the Commission additional context and transparency into how and when short positions in the reported equity security are being closed out or reduced.

The Commission believes that the information in Columns 10, 11, and 15 is useful in providing the Commission additional context and transparency into how and when short positions in the reported equity security are being created or increased.

4. Procedures for Filing and Amending Proposed Form SHO

Managers will have two ways to file Proposed Form SHO or any amended Proposed Form SHO to the Commission. A Manager can use a fillable web form provided by EDGAR to input Proposed Form SHO disclosures that EDGAR will convert to Proposed Form SHO-specific XML or, alternatively, use its own software tool to file Proposed Form SHO to EDGAR directly in Proposed Form SHO-specific XML.[71] If a Manager uses the web-fillable Proposed Form SHO on EDGAR and encounters a technical error when filling out the form, such Manager will be required to correct the identified technical error before being permitted to file the Proposed Form SHO through EDGAR. If a Manager uses its own software tool to file a Proposed Form SHO filing to EDGAR directly in Proposed Form SHO-specific XML, and a technical error is identified by EDGAR after the filing is sent, such Manager will receive an error message that the filing has been suspended, and will be required to correct the identified technical error and re-file the Proposed Form SHO through EDGAR.[72]

A Manager that determines or is made aware that it has filed a Proposed Form SHO with errors that affect the accuracy of the information reported must file an amended Proposed Form SHO within ten (10) calendar days of discovery of the error. Filing an amended Proposed Form SHO within 10 calendar days of discovery of the error would provide Managers with a reasonable period of time to prepare the Proposed Form SHO amendment, while helping to ensure that accurate information is received by the Commission in a timely manner.

To facilitate the Commission's process of aggregating the short sale related information reported on Proposed Form SHO for publication, amendments to Proposed Form SHO must restate the Proposed Form SHO in its entirety. To inform the Commission that the filing is an amendment of a previously filed Proposed Form SHO, a Manager must check the box on the Proposed Form SHO Cover Page to indicate that the filing is an ''Amendment and Restatement.'' On the Cover Page of each Amendment and Restatement filed, a Manager must provide a written description of the revision being made, explain the reason for the revision, and indicate whether data from any additional Proposed Form SHO reporting period(s) (up to the past 12 calendar months) is/are affected by the amendment. If other reporting periods have been affected, a Manager shall complete and file a separate Amendment and Restatement for each previous calendar month so affected, and provide a description of the revision being made and explain the reason for the revision. As discussed below, the Commission proposes to provide aggregated data on a rolling twelve-month basis, with prior months' data updated as necessary to reflect data from Amendments and Restatements. The Commission proposes to limit the requirement to file amended Proposed Forms SHO to twelve months to reduce the burden and cost on Managers.

If a revision reported in an Amendment and Restatement changes a data point reported in the Proposed Form SHO that is being amended by twenty-five percent (25%) or more, the Manager must notify the Commission staff via the Office of Interpretation and Guidance of the Division of Trading and Markets (''TM OIG'') at *TradingAndMarkets@sec.gov* within two (2) business days after filing the Amendment and Restatement. The Commission believes that a change of 25% or greater reflects a significant change, particularly for securities with few Managers reporting Proposed Form SHO data, which, as discussed below, should be highlighted in the updated aggregated data that will be published.

Regardless of the scope of the revision being reported, if the data being reported in an Amendment and Restatement affects the data reported on

[70] Regulation M Rule 105 makes it unlawful, in connection with an offering of certain equity securities, for any person to sell short a security that is the subject of an offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the Rule 105 restricted period. *See* 17 CFR 242.105(a).

[71] The filing options described for Proposed Form SHO are consistent with other EDGAR filings that are filed in Form-specific XML-based languages. *See, e.g., Regulation of NMS Stock Alternative Trading Systems,* Exchange Act Release No. 83663, (July 18, 2018), 83 FR 38768 (Dec. 9, 2021) (requiring new EDGAR Form ATS–N to be filed in an XML-based language specific to that Form).

[72] The Commission's XML schema (*i.e.,* the set of technical rules associated with Proposed Form SHO-specific XML) for Proposed Form SHO would incorporate validations of each data field on Proposed Form SHO to help ensure consistent formatting and completeness. For example, letters instead of numbers in a field requiring only numbers, would be flagged by EDGAR as a ''technical'' error that would require correction by the reporting Manager in order to complete its Proposed Form SHO filing. Field validations act as an automated form completeness check when a Manager files Proposed Form SHO through EDGAR; they do not verify the accuracy of the information submitted in Proposed Form SHO filings.

the Proposed Form SHO reports filed for multiple Proposed Form SHO reporting periods, the Manager, within two (2) business days after filing the Amendment and Restatement, must provide the Commission staff via TM OIG with notice of such occurrence, and provide an explanation of the reason for the revision. Reporting discrepancies could harm the integrity of the data being reported on Proposed Form SHO through EDGAR (and published by the Commission on an aggregated basis as discussed herein), particularly if such reporting discrepancies go uncorrected. The Commission believes that requiring a Manager to notify Commission staff when reporting discrepancies have occurred, with a description of the revision being made and the reason for the revision, would help Commission staff determine whether there may be an ongoing or continuing issue with the integrity of the data being reported by that Manager.

Each reporting period, the Commission plans to update prior months' aggregated Proposed Form SHO data on EDGAR to reflect information reported in Amendments and Restatements and will add an asterisk (*i.e.,* *) or other mark for any updated data for which a Manager notified Commission staff that it filed an Amendment and Restatement to correct a data point of 25% or greater to highlight for market participants that the published aggregated data includes significantly revised data. The Commission will publish the aggregated Proposed Form SHO data for the latest reporting period along with aggregated Proposed Form SHO data for the prior twelve months on a rolling basis. The published aggregated Proposed Form SHO data will include a disclaimer that the Commission does not ensure the accuracy of the data being published.

C. Publication of Information by the Commission

The Commission will publish through EDGAR aggregated information regarding each equity security reported by all Managers. The Commission estimates that it will publish such aggregated information within one month after the end of the reporting calendar month.[73] The Commission will use the time following receipt of the monthly forms to aggregate the data received from the reporting Managers. The Commission does not plan to verify the accuracy of data elements reported by Managers, but may consider doing so in the future after assessing whether such verification would be beneficial. This delay prior to publication will also help protect reporting Managers' proprietary trading strategies, thereby reducing the risk of imitative trading activity by the market.[74]

Analysis of data filed under temporary Rule 10a–3T showed the mean duration that short positions were held after the end of the month ranged from nine (9) to thirteen (13) calendar days, increasing with higher threshold levels, and the median position was not held into the following month.[75] At a Reporting Threshold of $10 million or 2.5% of shares outstanding, positions were held for a mean of 9.85 calendar days and a median of 0 calendar days. Therefore, the Commission believes Managers would close the majority of short positions prior to publication. Under Proposed Rule 13f–2, the requirement to file Proposed Form SHO within 14 calendar days after the end of each calendar month applies to Managers who meet or exceed either Reporting Threshold.

With regard to each individual equity security reported by Managers on Proposed Form SHO's Information Tables 1 and 2 (discussed above), the Commission will publish the issuer's name, and active LEI (if the issuer has an active LEI). The Commission will also publish the equity security's title of class, CUSIP, and FIGI (if a FIGI has been assigned). These data points will identify the equity security for which information is being reported.

With regard to Proposed Form SHO's Information Table 1, entitled ''Manager's Gross Short Position Information'' (discussed above), the Commission will publish, as an aggregated number of shares across all reporting Managers, the number of shares of the reported equity security that represent the Managers' gross short position at the close of the last settlement date of the calendar month, as well as the corresponding US dollar value of this reported gross short position. The Commission will also publish a summary of the Managers' reported hedging information with regard to the reported equity security. Specifically, the Commission will identify the percentage of the aggregate gross short position for a reported equity security that is reported as being fully hedged, partially hedged, or not hedged.

With regard to Proposed Form SHO's Information Table 2, entitled ''Daily Activity Affecting Manager's Gross Short Position during the Reporting Period'' (discussed above), for each reported equity security, for each individual settlement date during the calendar month, the Commission will publish the ''net'' activity in the reported equity security, as aggregated across all reporting Managers. The net activity will be expressed by a single identified number of shares of the reported equity security, and will be determined by offsetting the purchase and sale activity that is reported by Managers in Columns 7 through 16 of Information Table 2. A positive number of shares identified would indicate net purchase activity in the equity security on the specified settlement date, while a negative number of shares identified would indicate net sale activity.

The aggregated information published would provide market participants with additional information beyond what is currently publicly available, specifically information regarding the scope of activity during the calendar month by reporting Managers as a group. Furthermore, by providing the aggregated security-level information through EDGAR in a structured, machine-readable data language, the Commission would allow investors and other public data users to download the aggregated information directly. In each case, the data could then be analyzed using various tools and applications, thus potentially removing the need to pay a third-party vendor to search for, extract, and structure the published information.

D. Reporting Thresholds

1. Threshold Structure

Setting a reporting threshold level involves a tradeoff between the interests of gathering and disclosing data, such as short sale related data, and potential costs to reporting Managers.[76] A reporting threshold that is set too low could impose substantial compliance costs on Managers that tend to have small short positions or are low volume short sellers, and may only provide incrementally meaningful short sale related data. A reporting threshold that is set too high might limit the amount of data provided to regulators and industry participants, and incentivize Managers to develop trading strategies

[73] The Commission notes that publication of the aggregated information may be delayed for an initial period following effectiveness of Proposed Rule 13f–2 and Proposed Form SHO.

[74] *See generally infra* Parts VIII.C.5 and VIII.F (discussing ''copycat trading'').

[75] *See infra* Parts III.D.2 and VIII.C.3.v for additional discussion of analysis of temporary Rule 10a–3T data.

[76] These costs to reporting Managers include, for example, compliance costs of reporting; costs associated with retaliation to short sellers, including an increased risk of short squeezes; and market participants reducing their short positions to avoid disclosure, which can have negative impacts on price discovery and market efficiency.

designed to avoid having to report their short sale related data altogether.[77]

The Reporting Thresholds are designed to require the filing of Proposed Form SHO by Managers with substantial gross short positions. The Reporting Thresholds are structured to make it more difficult for Managers with substantial gross short positions to avoid disclosure by trading below a Reporting Threshold, particularly with lower market capitalization securities. The Reporting Thresholds are based on a Manager's gross short position in the equity security itself, and do not include the calculation of derivative positions or long positions in the equity security. While the proposed rule does not include derivatives as part of the threshold calculation, the Commission is proposing to require Managers to report certain changes in their gross equity short positions derived from acquiring or selling the equity in connection with derivative activity, such as exercising an option. The Commission believes this proposed approach balances Managers' reporting costs with the utility such data provides to regulators.

Threshold A. The Commission is proposing a two-pronged reporting threshold structure with regard to any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (a reporting company issuer). Specifically, Threshold A, identified in Proposed Rule 13f–2(a), is focused on Managers that, with regard to each equity security of a reporting company issuer in which the Manager and all accounts over which the Manager or any person under the Manager's control has investment discretion, collectively have either (1) a gross short position in the equity security with a US dollar value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month, or (2) a 2.5% or higher monthly average gross short position as a percentage of shares outstanding in the equity security.

This two-pronged approach measures the size of the short position in question relative to both a monetary dollar amount and the number of shares outstanding. This approach is designed to ensure that a substantial short position in either a small capitalization security or a large capitalization security could potentially trigger a reporting obligation under Threshold A. As noted above, the Reporting Thresholds are based on a Manager's gross short position in the equity security itself, and do not include the calculation of derivative positions or long positions in the equity security. The Commission believes that this is a simple and straight forward approach for Managers to determine whether they meet Threshold A that avoids any additional cost and complexity of including derivative or long positions.

The Commission believes that requiring reporting of short positions with a US dollar value of $10 million or more would capture Managers with substantial short positions, even if such positions are relatively small compared to the market capitalization of the issuer. To determine whether this dollar threshold is met, a Manager will be required to determine its end of day gross short position on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the relevant settlement date.

The Commission believes that using end of day gross short position, rather than an intraday high gross short position, for example, would help to prevent Managers engaged in intraday market making strategies (who do not typically carry large overnight short positions) from triggering this $10 million threshold.[78] The use of the end of day position on any settlement date as opposed to the last settlement date of the month is designed to prevent a scenario where, for example, a Manager engages in trading activity on the last day of the month to avoid reporting altogether.

In addition, the Commission believes that requiring the reporting of short positions with a 2.5% or higher monthly average gross short position would capture Managers with gross short positions that are large relative to the size of the issuer, and could therefore have a significant impact on the issuer. Using a monthly average gross short position, rather than an end of month gross short position, is also designed to prevent the scenario where a Manager engages in trading activity on the last day of the month in order to avoid reporting. To determine whether this percentage threshold is met, a Manager shall (a) identify its gross short position in the equity security at the close of each settlement date during the calendar month, and divide that figure by the number of shares outstanding in such security at the close of that settlement date, and (b) add up the daily percentages during the calendar month as determined in (a) and divide that total by the number of settlement dates during the calendar month of the reporting period. The number of shares outstanding of the equity security shall be determined by reference to an issuer's most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission.

Threshold B. The Commission is separately proposing a single-pronged reporting threshold structure with regard to any equity security of a non-reporting company issuer. Specifically, Threshold B, identified in Proposed Rule 13f–2(a), is focused on Managers that, with regard to each equity security of a non-reporting company issuer in which the Manager and all accounts over which the Manager or any person under the Manager's control has investment discretion, collectively have a gross short position in the security with a US dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month.

With regard to an equity security of a non-reporting company issuer, the Commission understands that the number of total shares outstanding may not be readily and consistently accessible to Managers. As such, the Commission has determined that a single-pronged reporting threshold based on a set dollar value is appropriate for equity securities of non-reporting company issuers. The Commission believes that this approach is an efficient way for Managers to determine whether they meet Threshold B that avoids the potential additional cost and complexity of locating total number of shares outstanding for a non-reporting company issuer that might be difficult, or impossible, to locate.

Like Threshold A, Threshold B is based on a Manager's gross short position in the equity security itself, and does not include the calculation of derivative positions or long positions in the equity security. As noted above, the Commission believes that this is a simple and straight forward approach for Managers to determine whether they meet Threshold B that avoids any additional cost and complexity of including derivative or long positions.

The Commission believes that requiring reporting of short positions with a US dollar value of $500,000 or

[77] With regard to reporting thresholds, research has shown that some short sellers in Europe, for example, avoid crossing the stated percentage reporting threshold of 0.5% of shares outstanding by keeping their short positions just under such reporting threshold. *See* Eur. Sec. and Mkts. Auth., ESMA Report on Trends, Risks and Vulnerabilities No. 1, 62–63 (2018), *available at https://www.esma.europa.eu/sites/default/files/library/esma50-165-538_report_on_trends_risks_and_vulnerabilities_no.1_2018.pdf.*

[78] *See, e.g.,* Albert J. Menkveld, *High frequency trading and the new market makers,* 16 J. Fin. Mkts., 712, 712–740 (2013).

more would capture Managers with substantial short positions in an equity security of a non-reporting company issuer, even if such positions are relatively small compared to the market capitalization of the issuer. To determine whether this dollar threshold is met, a Manager will be required to determine its end of day gross short position on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the relevant settlement date. In circumstances where such closing price is not available, a Manager would be required to use the price at which it last purchased or sold any share of that security, which would be readily available to the Manager, in determining whether Threshold B is met.

The Commission believes that using end of day gross short position, rather than an intraday high gross short position, for example, would help to prevent market participants engaged in intraday market making strategies (who do not typically carry large overnight short positions) from triggering this $500,000 threshold. The use of the end of day position on any settlement date as opposed to the last settlement date of the month is designed to prevent a scenario where, for example, a Manager engages in trading activity on the last day of the month to avoid reporting altogether.

2. Determination of Reporting Threshold

As discussed in this section, the Reporting Thresholds are based on comment letters and analysis of Form SH data collected under Rule 10a–3T. Rule 10a–3T required reporting of short positions that were either greater than 0.25% of shares outstanding or $10 million in fair market value. Comment letters to Rule 10a–3T generally concurred with the dollar reporting obligation but expressed concerns that the percentage obligation was too low. Suggestions for a percentage reporting obligation ranged from 1% to 5% of shares outstanding.[79]

Threshold A. Based on analysis of Form SH data,[80] the Commission believes that a two-pronged threshold of $10 million or 2.5% of shares outstanding would provide significant coverage of the dollar value of positions, while limiting the reporting burden on Managers. Panel A of Table I shows the Reporting Threshold would have captured 89% of the dollar value of the positions reported by Managers who were required to report Form SH; Panel B shows that it would have captured 346 Managers.[81] The reporting burden would not significantly increase compared to slightly higher threshold levels, while the value of the positions potentially collected would drop significantly for higher dollar threshold levels.

TABLE I—VARIOUS THRESHOLD LEVELS FOR MONTHLY AVERAGE POSITIONS AND MONTHLY MAXIMUM DOLLAR VALUE

Greater than (%)	Greater than								
	$0	$1M	$5M	$10M	$15M	$20M	$25M	$50M	$100M
Panel A: Percentage of Position Dollar Value									
0.0	100	100	100	100	100	100	100	100	100
0.25	100	100	100	100	98	96	94	88	82
0.5	100	100	98	95	92	88	85	76	68
1.0	100	100	96	91	85	81	77	65	54
1.5	100	100	96	90	83	78	74	60	48
2.0	100	100	95	90	83	77	72	58	45
2.5	100	100	95	89	82	77	72	56	43
3.0	100	100	95	89	82	76	71	55	42
4.0	100	100	95	89	82	76	71	54	40
5.0	100	100	95	89	82	76	71	54	39
Panel B: Number of Managers by Position Percentage or Position Dollar Value									
0.0	442	442	442	442	442	442	442	442	442
0.25	442	442	442	442	435	429	425	421	419
0.5	442	435	406	402	388	380	373	360	355
1.0	442	433	384	373	348	335	320	294	281
1.5	442	432	377	362	333	314	293	255	232

[79] *See, e.g.,* Seward & Kissel LLP, *available at https://www.sec.gov/comments/s7-31-08/s73108-43.pdf,* Investment Adviser Association, *available at https://www.sec.gov/comments/s7-31-08/s73108-38.pdf,* and Securities Industry and Financial Markets Association, *available at https://www.sec.gov/comments/s7-31-08/s73108-52.pdf.*

[80] To perform this analysis, Form SH data on daily short positions for November 2008 through February 2009 were filtered to remove duplicate and missing observations, weekend or holiday observations, and positions below the *de minimis* reporting threshold. They were matched to Center for Research in Security Prices, LLC for daily closing prices and Compustat for daily shares outstanding. The Commission recognizes that the results of an analysis of Form SH data may not fully reflect the status quo but that the analysis uses appropriate data currently available to the Commission for this use. The Form SH data covered a limited time period, may not be comparable because of subsequent market changes, and did not represent ''normal'' market conditions as the trading took place during and after the 2008 financial crisis. Additionally, Managers that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of less than $100 million were not required to report. Further, we believe that many aggregated short positions that we calculated using Form SH data likely overestimate the actual number of shares that were short. This is because in many instances the size of a short position calculated using Form SH data was greater than 100% of FINRA short interest for the same stock on the same date. This difference could potentially be explained if arranged financing, which is not included in the definition of FINRA short interest, was a large fraction of aggregated Form SH short positions. According to FINRA, ''arranged financing programs (sometimes called 'enhanced lending' or 'short arranging products') [describe an arrangement in] which a customer [ ] borrow[s] shares from [its broker's] domestic or foreign affiliate and [then] use[s] those shares to close out a short position in the customer's account.'' *See* FINRA Notice 21–19 *available at https://www.finra.org/sites/default/files/2021-06/Regulatory-Notice-21-19.pdf.* In addition, this difference could also be explained if affiliated Managers reported the same short positions on multiple Form SH filings. Despite the potential overestimate, the Commission believes that the analysis provides information informative for selecting the Reporting Threshold because it involves the same type of entities (Managers) and the same activity (short positions). Intraday short selling activity could not be examined because the data field for ''Number of Securities Sold Short'' was populated in only 7% of observations after filters were applied, likely because most short selling volumes were below the threshold.

[81] Although they were not required to, some Managers submitted data for positions below the 10a–3T reporting threshold. These were excluded from the analysis. *See* Part VIII.C.3.v for additional discussion. *See also infra* notes 365–66 and accompanying text.

TABLE I—VARIOUS THRESHOLD LEVELS FOR MONTHLY AVERAGE POSITIONS AND MONTHLY MAXIMUM DOLLAR VALUE—Continued

Greater than (%)	Greater than								
	$0	$1M	$5M	$10M	$15M	$20M	$25M	$50M	$100M
2.0	442	432	374	350	319	297	275	229	202
2.5	442	432	373	346	312	286	261	210	178
3.0	442	432	373	345	310	282	255	200	165
4.0	442	432	372	344	306	277	247	184	142
5.0	442	432	372	343	303	274	243	174	127

This table reports the coverage of Managers reporting at different threshold levels. Data are from Form SH filings for a 4 month period from 2008 to 2009. The ''Greater than'' levels are cumulative. Entries are calculated as a percentage of Manager/stock observations for the row or column criteria. Rows are monthly average positions as a percentage of shares outstanding and columns are monthly maximum unscaled dollar value of positions as determined by the daily closing price in Center for Research in Security Prices, LLC (CRSP). Values in Panel A are average percentages of total position dollar value. Values in Panel B are the average number of Managers reporting.

Threshold B. Based on analysis of OTC Markets data,[82] the Commission believes that a threshold of $500,000 would provide significant coverage of the dollar value of positions, while limiting the reporting burden on Managers. The $500,000 threshold is also similar to the median dollar value of 2.5% of the market capitalization of OTC stocks for which we were able to obtain total shares outstanding. The median for this set of stocks was approximately $460,000. The proposed threshold of $500,000 is the rounded median and is likely greater than 2.5% of the market capitalization of the equity securities of non-reporting company issuers, assuming such equities have lower market capitalization than that of reporting company issuers. The Commission believes that this level provides a reasonable estimate in the absence of data on the market capitalization for equity securities of non-reporting company issuers. Table II shows Threshold B would have captured over 99% of the dollar value of short positions and 15% to 24% of Managers, assuming 1 to 3 Managers had equivalently-sized short positions in each stock.

TABLE II—VARIOUS THRESHOLD LEVELS FOR OTC STOCKS

Greater than	% of $ Short Interest	% of Short Positions (1 Manager per stock)	% of Short Positions (3 Managers per stock)
$50K	99.91	48.08	35.47
$100K	99.82	40.38	27.56
$250K	99.52	29.70	21.58
$500K	99.17	23.72	15.60
$1M	98.65	19.66	13.03
$5M	95.30	10.90	6.84
$10M	92.66	8.76	3.63

This table reports the coverage of the short interest in the equities in non-reporting company issuers at different threshold levels. Data are from OTC Markets Group for September 30, 2020. The ''Greater than'' levels are cumulative. ''% of $ Short Interest'' is the percentage of total dollar value of short interest. ''% of Short Positions'' is the percentage of short positions, assuming 1 or 3 Managers have short positions in each stock.

E. Supplementing Current Short Sale Data Available From FINRA and the Exchanges

As noted above, certain short sale data is publicly disseminated currently by FINRA and most of the exchanges. Notably, however, FINRA or the exchanges, at their discretion, could modify, or eliminate, their collection or publication of such short sale data. Moreover, the Commission understands that some of the exchanges require payment of a fee to access the data, which may make it difficult for some investors to access. The Commission believes that the short sale data provided pursuant to Proposed Rule 13f–2 and Proposed Form SHO would supplement the short sale information that is currently publicly available from FINRA and the exchanges, with the benefit of having certain of the short sale data provided consolidated in a readily accessible location (*i.e.,* EDGAR), with aggregated data free to all investors and other market participants. The short sale data collected pursuant to Proposed Rule 13f–2 and Proposed Form SHO, for example, would include certain activity related data that is not currently available from FINRA or the exchanges, including activity in related options. While FINRA's existing short interest data reports aggregate short positions on a bi-monthly basis,[83] they do not reflect the timing with which short positions increase or decrease in the two week period between the two reporting dates. The short sale data collected pursuant to Proposed Rule 13f–2 and Proposed Form SHO would help to fill that gap. The Commission believes that publication of this additional information, aggregated as discussed above, could help to further inform market participants regarding overall short sale activity by reporting

[82] This analysis was performed using data from OTC Markets Group Inc. available through Wharton Research Data Services, *https://wrds-www.wharton.upenn.edu/pages/about/data-vendors/otc-markets-group/*. The data were filtered to only include equities that had a closing price and short interest on September 30, 2020. Approximately 13% of the data did not have total shares outstanding available, representing approximately 14% of the dollar value of short interest. We use these data without shares outstanding as a proxy for non-reporting issuers. The Commission used September 2020 because that is the most recent date in which a dataset containing total shares outstanding for a broad set of OTC equities was available.

[83] The short interest data reported reflects aggregate short positions as of the specified reporting dates.

Managers with substantial short positions.

F. Request for Comments

While the Commission welcomes any public input on Proposed Rule 13f–2 and Proposed Form SHO, the Commission asks commenters to consider the following questions.

- Q1: *EDGAR:* Managers that meet a Reporting Threshold would be required to report prescribed short sale related data on Proposed Form SHO through EDGAR.
  - Are there are other reporting mechanisms for reporting Managers that would be more appropriate, including more efficient, than reporting through EDGAR? If so, please identify the alternative reporting mechanism, and provide the reasons why such alternative reporting mechanism would be more appropriate.
- Q2: *Managers:* Under Proposed Rule 13f–2, the Commission is proposing that the information reported by Managers be aggregated across all reporting Managers prior to publication.
  - Please discuss any views on the reporting requirements of Proposed Rule 13f–2 and Proposed Form SHO.
  - Please discuss any views regarding the Commission's proposed approach to aggregate the reported information across all reporting Managers prior to publication and address the pros and cons, as applicable, of the Commission's proposed approach.
  - Proposed Rule 13f–2 would require that a Manager provide identifying information including its active LEI (if it has one) when filing Proposed Form SHO. If a Manager does not have an active LEI, should such Manager be required to obtain an LEI?
- Q3: *Hedging Information:* When reporting on Proposed Form SHO, Managers would be required to identify whether the gross short position reported is fully hedged, partially hedged, or not hedged.
  - Please describe any views regarding the reporting of hedging information as proposed by the Commission and address the pros and cons, as applicable.
  - Do Managers generally know whether a position is fully hedged or partially hedged?
  - Is there a common understanding among Managers regarding what fully hedged or partially hedged means? Are those understandings different than the Commission's proposed instructions and discussion above? If there is a common understanding or definition, please describe it.
  - Is the Commission's description of ''fully hedged'' or ''partially hedged'' appropriate for purposes of reporting under Proposed Rule 13f–2? If so, describe why. If not, please describe what would be an appropriate definition of these terms for purposes of Manager reporting under Proposed Rule 13f–2.
  - Would the required hedging information provide important information to assist in interpreting the reported gross short position information?
    - If not, what other information might help to inform on the economic exposure of the reported gross short position?
- Q4: *Publication of ''Activity'' Information by the Commission:*
  - Please discuss any views regarding the Commission's proposed approach with regard to the publication of aggregated ''net'' activity, as described above, and address the pros and cons, as applicable.
  - Would aggregated ''net'' activity be more useful and informative if it was published by ''category'' of activity identified in Information Table 2, rather than consolidated across all ''categories'' of activity identified in Information Table 2?
  - Is there another manner in which aggregated ''activity'' information could be published that would be more useful and informative than is proposed by the Commission? If so, please describe.
- Q5: *Reporting Thresholds:* Under Proposed Rule 13f–2, only Managers that meet a stated Reporting Threshold would be required to report on Proposed Form SHO through EDGAR. This approach is intended to focus reporting by Managers with substantial gross short positions.
  - Are the proposed Reporting Thresholds appropriate? If so, explain why. If not, explain why not and how the Reporting Thresholds should be modified.
  - Do you believe that Managers would try to avoid triggering the proposed Reporting Thresholds? If so, please explain.
  - In determining whether the dollar value threshold in Threshold A (U.S. dollar value of $10 million or more) is met, the Commission proposes that a Manager utilize the closing price at the close of regular trading hours on the settlement date. Should Managers be required to use a specific source of information in determining the closing price of the equity security? If yes, explain why, and describe the source(s) of information. Could there be circumstances in which a closing price is not available for equity securities subject to Threshold A? If yes, please describe those circumstances. In such circumstances, should a Manager be required to use a specific source of information in determining the closing price of the equity security?
  - To determine whether the percentage threshold in Threshold A (2.5% or more) is met, the Commission proposes that a Manager utilize the number of outstanding shares of the security for which information is being reported as determined by reference to an issuer's most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission. Are there circumstances in which Managers should not reference these reports filed with the Commission to determine the number of outstanding shares? If yes, please describe those circumstances. Should Managers be required or permitted to use a different source of information in determining the number of shares outstanding of the equity security? If yes, please explain why, and describe the source(s) of information.
  - In determining whether the dollar value threshold in Threshold B (U.S. dollar value of $500,000 or more) is met, the Commission proposes that a Manager utilize the closing price at the close of regular trading hours on the settlement date. The Commission further proposes that in circumstances where such closing price is not available, a Manager would be required to utilize the price at which it last purchased or sold any share of that equity security in determining whether Threshold B is met. Should Managers be required to use a specific source of information in determining the closing price of such an equity security—for example, the closing price provided on an interdealer quotation system (''IDQS'') [84] or an alternative trading system (''ATS'') [85]? Or alternatively, last available sale price of such equity security? If yes, explain why, and describe the source(s) of information.
  - Managers would be required to report their gross short positions in equity securities without offsetting such gross short positions with long shares of the equity security or with an equivalent long position through derivatives of the equity security. Are there any pros and cons of such a proposed approach, especially when compared to using a ''net'' short interest position calculation? If so, explain why, and describe any associated costs and benefits.
- Q6: *Securities Covered:* Under Proposed Rule 13f–2, Managers would be required to report to the Commission certain short sale related data, as

[84] *See* 17 CFR 240.15c2–11(e)(3).

[85] *See* 17 CFR 242.300(a).

described above, for equity securities consistent with the Commission's short sale regulations (*i.e.,* Regulation SHO).

○ Should reporting Managers be required to report short sale related data for a different universe of securities than equity securities consistent with Regulation SHO? If so, please explain why and describe the universe of securities that would be more appropriate.

○ Should fixed income securities be included under Proposed Rule 13f–2? If yes, explain why and describe what costs and benefits might be associated with such reporting.

○ Should other securities be included under Proposed Rule 13f–2? If yes, identify such securities, explain why, and describe what costs and benefits might be associated with such reporting.

○ Should certain securities be excluded from Proposed Rule 13f–2 reporting? If yes, identify the securities in question, and explain why.

○ ETFs would be included under Proposed Rule 13f–2. Should ETFs be excluded from Proposed Rule 13f–2? If yes, describe why. If no, explain why not.

• Q7: *Economic Short Positions:* Proposed Rule 13f–2 requires that a Manager calculate its gross short position in the equity security in determining whether it meets the Reporting Thresholds.

○ Should a Manager also be required to include short positions resulting from derivatives in determining whether it meets the Reporting Thresholds? If so, explain why, and describe any associated costs and benefits to doing so. If not, explain why not.

▪ Should only certain derivative positions be included? If so, which ones and why?

▪ Should certain derivative positions not be included? If so, which ones and why?

▪ Does excluding derivative positions create opportunities to avoid triggering the Reporting Thresholds through other economically equivalent instruments? If so, please explain.

• Q8: *Short Position Information:* Under Proposed Rule 13f–2, Managers that meet a Reporting Threshold are required to report their end of month gross short position in the equity security.

○ Should a Manager also be required to separately report its end of month gross short position in derivatives, including, for example, options? Please explain.

○ If yes, should only certain derivatives be reported? Please explain.

○ If yes, should certain derivatives not be reported? Please explain.

○ Please describe any views related to the pros or cons associated with reporting end of month gross short positions in derivatives.

○ Proposed Form SHO requires Managers to report CUSIP and if assigned, FIGI, for a security for which information is being reported in both Instruction Tables 1 and 2. If a FIGI has been assigned, should a Manager be required to report CUSIP as well?

○ Please describe any views related to the position data that a Manager would be required to report as described in Information Table 1 of Proposed Form SHO.

• Q9: *Short Sale ''Activity'' Information Reported by Managers:* Under Proposed Rule 13f–2, Managers would be required to report on Proposed Form SHO all activity in the equity security on each settlement date during the calendar month.

○ Please describe any views related to the ''categories'' of activity data that a Manager would be required to report as described in Information Table 2 of Proposed Form SHO.

○ With regard to the reporting of ''other'' activity, are there certain types of ''other'' activity that should be reported? If yes, describe the other activity and describe why it should be reported.

○ ETF creations and redemptions would be included under Proposed Rule 13f–2. Should ETF creations and redemptions be excluded from Proposed Rule 13f–2? If yes, describe why. If no, explain why not.

○ Should other activity be included or excluded from Proposed Rule 13f–2? If yes, describe the other activity and describe why it should be included or excluded.

• Q10: *Indirect Short Positions or Short Activities:* Managers meeting a Reporting Threshold would be required to report a gross short position in an ETF, but would not be required to consider short positions that the ETF holds in individual underlying equity securities that are part of the ETF basket in determining whether the Manager meets a Reporting Threshold for such underlying equity securities that are part of the ETF basket.

○ Should Managers be required to consider short positions that the ETF holds in individual underlying equity securities that are part of the ETF basket in determining whether the Manager meets a Reporting Threshold for such underlying equity securities that are part of the ETF basket? If yes, explain why. If no, explain why not.

○ Are there other diversified portfolio products in addition to ETFs that should be included? If yes, describe the product. Describe why, or why not, a Manager should be required to consider short positions in individual underlying equity securities of the product's basket of assets.

• Q11: *Frequency of Reporting:* Under Proposed Rule 13f–2, a Manager that meets a Reporting Threshold must file Proposed Form SHO with the Commission within 14 calendar days after the end of each calendar month.

○ Is monthly reporting by Managers appropriate? If so, explain why. If no, explain why not and describe an alternative frequency of reporting that is more appropriate.

○ Does reporting within 14 calendar days of the end of the calendar month provide reporting Managers sufficient time to accurately report the short sale related information as described in Proposed Rule 13f–2? If no, please explain why not and describe any suggested alternative timeline(s). Alternatively, is the 14 calendar days after the end of the calendar month reporting period for Managers too much time? If so, please explain why and describe any suggested alternative.

• Q12: *Multiple Managers with Investment Discretion.* As noted above, as is the case for Form 13F filers, under Proposed Rule 13f–2, to prevent duplicative reporting of Proposed Form SHO if two or more Managers, each of which is required by Proposed Rule 13f–2 to file Proposed Form SHO for the reporting period, exercise investment discretion with respect to the same securities, only one such Manager must report the information in its report on Proposed Form SHO.

○ Please describe any views related to the pros or cons associated with the Commission's proposed approach as described above.

○ Will a Manager always be aware of instances in which there is another Manager(s) with investment discretion with respect to the same securities? If yes, how will that Manager be aware of the other Manager(s)? If yes, if there is more than one Manager that has investment discretion with respect to the same securities, how would each manager determine which Manager shall report short position and short position activity pursuant to Proposed Form SHO in order to avoid duplicative reporting?

○ Should there be a mechanism that requires Managers to coordinate with one another to avoid duplicative reporting? If yes, please describe. In addition, please describe any alternative approach designed to prevent duplicative reporting by Managers.

• Q13: *Amendments to Proposed Form SHO:* A Manager that determines

that it has filed a Proposed Form SHO that includes inaccurate information must file an amended Proposed Form SHO within 10 calendar days of discovery of the error. Amendments to Proposed Form SHO must restate the Proposed Form SHO in its entirety and provide on the Proposed Form SHO Cover Page prescribed information about the revision being made—including the impact on prior Proposed Form SHO reporting periods. In prescribed circumstances, Managers must notify the Commission staff of the filing of an amended Proposed Form SHO.

○ Please discuss any views regarding the Commission's proposed approach regarding filing amendments to Proposed Form SHO and address the pros and cons, as applicable, of the Commission's proposed approach. In particular:

- Should the Commission provide updated data on a rolling basis for more (or less than) 12 consecutive months?
- Should Managers notify Commission staff of errors for any data point of greater than, or less than, 25%? Should the Commission flag, with an asterisk or other indicator, updates to published data that are less than 25% of prior published data? Should the Commission use other types of indicators (*e.g.,* asterisk for an update of 25% or greater, or other indicator for update of less than 25%, etc.)?
- In filing an amended Proposed Form SHO, should Managers be required to re-file the entire Proposed Form SHO, or should Managers have the opportunity to re-file only the data that is being corrected?
- The Commission is proposing to require Managers to notify Commission staff about multiple consecutive Amendments and Restatements to help Commission staff determine if there is a continuing issue with the integrity of that Manager's filings. Should Managers be required to notify Commission staff only if there are a specified number of months of consecutive Amendments and Restatements, *e.g.,* three, four, or five consecutive months?
- The Commission is proposing that if a revision reported in an Amendment and Restatement changes a data point reported in the Proposed Form SHO by twenty-five percent (25%) or more, the Manager must notify the Commission staff via email within two (2) business days after filing the Amendment and Restatement. Does two (2) business days provide a Manager with sufficient time to notify the Commission? If no, please explain why not and describe any suggested alternative timeline(s).
- The Commission is proposing that, regardless of the scope of the revision being reported, if the data being reported in an Amendment and Restatement affects the data reported on the Proposed Form SHO reports filed for multiple Proposed Form SHO reporting periods, the Manager, within two (2) business days after filing the Amendment and Restatement, must provide the Commission staff via email with notice of such occurrence, and provide an explanation of the reason for the revision. Does two (2) business days provide a Manager with sufficient time notify the Commission? If no, please explain why not and describe any suggested alternative timeline(s).

On November 18, 2021, the Commission proposed rule 10c–1 under the Exchange Act [86]—a rule designed to increase the transparency and efficiency of the securities lending market by requiring lenders of securities to provide the material terms of securities lending transactions to a registered national securities association, such as FINRA. On [insert date of vote], the Commission reopened the comment period for proposed Rule 10c–1.[87] We encourage commenters to review the Reporting of Securities Loans Proposing Release to determine whether it might affect their comments on this proposing release and Proposed Rule 13f–2 and Proposed Form SHO.

IV. Potential Alternative Approach to Proposed Rule 13f–2 Regarding How the Information Reported on Proposed Form SHO Is Published by the Commission

As noted above, the Commission's Proposed Rule 13f–2 would require that a Manager provide identifying information including its name and active LEI, if the Manager has an active LEI, when filing Proposed Form SHO through EDGAR. The Commission would collect information from all reporting Managers and publish aggregated information across all Managers reporting in a particular equity security. The Commission, however, seeks comment on the following alternative approach regarding how the information reported on Proposed Form SHO by reporting Managers would be published by the Commission. Under this alternative approach, the Commission would not alter the proposed Reporting Thresholds or the information that would be reported by a reporting Manager on Proposed Form SHO, as described herein. However, under this alternative, the information reported by a Manager on Proposed Form SHO would be published as it is reported to the Commission, and would not be aggregated with information reported by other Managers. Reported information would therefore be published at the individual Manager level, rather than aggregated across all reporting Managers prior to publication. The reporting Manager's identifying information, including its name and active LEI, if the Manager has an active LEI, would be removed in an effort to anonymize the information published. In anonymizing the reporting Manager's information prior to publication, the Commission would be seeking to balance the above noted calls for additional short sale transparency with, among other things, the above noted concerns regarding potential issuer and investor retaliation against identified short sellers. The Commission remains concerned that such retaliation could result in a reduction in short selling, along with a reduction in the corresponding liquidity and price transparency benefits. The Commission further understands that despite measures designed to help anonymize published information, it may still be possible for market participants to identify certain reporting Managers. For example, it is not uncommon for there to be only one large short seller in an equity security, and under such circumstances, sophisticated traders may be able to link individual short sellers to their short positions reported on Proposed Form SHO through public statements, social media posts, or even rumors.[88] Using Threshold A as described above, the Commission estimates that 32% of reportable equity securities would have only one reporting Manager.

• Q14: *Managers and the Potential Alternative Approach:* Under the potential alternative approach presented, the reported information by a Manager would be published at the Manager level, without aggregation with other reporting Managers, with the reporting Manager's identifying information, including any active LEI, being removed prior to publication.

○ Please discuss the Commission's potential alternative approach, and address the pros and cons, as applicable.

[86] *Reporting of Securities Loans,* Exchange Act Release No. 93613 (Nov. 18, 2021) (''Reporting of Securities Loans Proposing Release'').

[87] *Reopening of Comment Period for Reporting of Securities Loans,* Exchange Act Release No. 34–94315 (Feb. 25, 2022).

[88] *See generally infra* Part VIII.D.2.

V. Proposed Amendment to Regulation SHO To Aid Short Sale Data Collection

The Commission is proposing new Rule 205 of Regulation SHO to facilitate its collection of more comprehensive data on the lifecycle of short sales. Proposed Rule 205 would establish a new ''buy to cover'' order marking requirement for certain purchase orders effected by a broker-dealer for its own account or the account of another person at the broker-dealer. Specifically, a broker-dealer would be required to mark a purchase order as ''buy to cover'' if, at the time of order entry, the purchaser (*i.e.,* either the broker-dealer or another person) has a gross short position in such security in the specific account for which the purchase is being made at such broker-dealer. A broker-dealer would be required to mark a purchase order as ''buy to cover,'' regardless of the size of such purchase order in relation to the size of the purchaser's gross short position in such security in the account, and regardless of whether the gross short position is offset by a long position held in the purchaser's account at the time of order entry.[89] If, for example, the purchaser has a gross short position of 100 shares in security ABC in account number 123 at broker-dealer X, then purchases 50 shares of ABC through broker-dealer X in account number 123 (a purchase amount less than the purchaser's gross short position in the account at broker-dealer X), broker-dealer X would be required to mark the purchase order as ''buy to cover.'' If the purchase order was instead for 150 shares of ABC in account number 123 (a purchase amount greater than the purchaser's gross short position in account number 123 at broker-dealer X), broker-dealer X would likewise be required to mark the purchase order as ''buy to cover.'' The proposed ''buy to cover'' marking requirement would not impact compliance with, or the operation of, other rules under Regulation SHO, including a broker-dealer's determination of whether to mark a sale order as ''long,'' ''short,'' or ''short exempt'' pursuant to Rule 200.

There is presently no ''buy to cover'' order marking requirement, so the Commission does not currently have regular access to ''buy to cover'' order marking information. The Commission believes that having ''buy to cover'' order marking information would provide additional context to the Commission and other regulators regarding the lifecycle of short sales by identifying the timing of purchases that close out, in whole or in part, open short positions in a security. The Commission believes this information would assist in reconstructing market events, and would be useful in identifying and investigating any potentially abusive trading practices including any potential manipulative short squeezes.[90]

To reduce potential burdens and costs to broker-dealers, the proposed rule would require the broker-dealer to determine only whether a purchase is being made for an account at the broker-dealer that has a gross short position in that equity security in that account at the time of the purchase. The Commission believes that this simplified approach would help minimize costs to broker-dealers by allowing short positions held in any accounts other than the purchasing account, as well as offsetting long positions held by the purchaser in the purchasing account or any other account, to be excluded for purposes of the broker-dealer's ''buy to cover'' order marking determination. The Commission believes that the resulting data would provide the Commission with an indication of which purchases are potentially associated with a ''short squeeze,'' where short sellers are pressured to cover their open short positions by purchasing shares as a result of increases in the price of a stock or borrowing costs. Having access to ''buy to cover'' information would help the Commission identify instances in which an increase in ''buy to cover'' orders in a particular equity security coincides with an increase in price and/or borrowing costs in the same equity security, and thus identify where ''short squeezes'' may be occurring. As discussed further below, this data would aid the Commission in reconstructing significant market events related to short selling.

The Commission alternatively considered proposing to require the broker-dealer to look across multiple accounts held by the customer within the broker-dealer itself, if applicable, and/or to its customer's account(s) held at other firms, if applicable, but determined that the costs and burdens to the broker-dealer would likely increase significantly under such an approach. With regard to other accounts held by the customer within the broker-dealer itself, the broker-dealer would incur additional costs and burdens in conducting such review. With regard to its customer's accounts held at other firms, the Commission understands that this information is not typically available to the broker-dealer and might be challenging to obtain. As a result, after considering the potential costs and burdens to broker-dealers, Proposed Rule 205 would require the broker-dealer to determine only whether a purchase is being made for an account at the broker-dealer that has an open short position in that equity security in that account.

The proposed ''buy to cover'' requirement would likely create one-time programming costs to broker-dealers as well as ongoing costs associated with order marking. The proposed ''buy to cover'' order mark determination would be distinct from that made by broker-dealers' existing order marking systems and processes designed to ensure compliance with Rule 200 of Regulation SHO. Thus, broker-dealers would be required to update their respective systems and processes to account for compliance with Proposed Rule 205 (*i.e.,* broker-dealers would likely need to program systems to add an additional field for the ''buy to cover'' order mark).

While the Commission welcomes any public input on Proposed Rule 205, the Commission asks commenters to consider the following questions.

- Q15: Should Proposed Rule 205 also require the broker-dealer to mark a purchase as ''buy to cover'' if the person is purchasing in an account that does not have a gross short position, but the person may have gross short positions in other accounts at the same and/or other broker-dealers? Would a purchase in a different account than an account with a gross short position in that security also be reflective of a person's intent to buy to cover a gross short position in that security? To what extent do short sellers buy to cover short positions by purchasing securities through accounts other than the account holding the short position? Would persons buy to cover securities at accounts at different broker-dealers? How often might such buy to cover orders occur in different accounts or at different broker-dealers? What would be the additional burdens or costs of such an additional requirement?
- Q16: Are there likely to be costs, other than those described in the

[89] Unlike the netting requirements under Rule 200 of Regulation SHO, the ''buy to cover'' order marking determination under Proposed Rule 205 will be made on a ''gross'' basis. The Commission believes that this approach would help minimize costs to broker-dealers because it would require them to determine only whether any short position is held by the account on whose behalf the purchase is being effected regardless of whether such short position is offset by any long position in the same security held by the purchaser in the same or any other account.

[90] *See infra* Part VIII.D.1 for a discussion of how the Commission could have used this data to enhance our understanding and recreation of the 'meme stock' phenomenon of January 2021.

release, to broker-dealers resulting from the proposed ''buy to cover'' order marking requirement?

• Q17: Should Proposed Rule 205 require broker-dealers to make the ''buy to cover'' order marking determination based on the purchaser's net short position instead of gross short position? What are the costs and benefits associated with each approach?

VI. Proposal To Amend CAT

In July 2012, the Commission adopted Rule 613 of Regulation NMS, which required national securities exchanges and national securities associations (the ''Participants'') [91] to jointly develop and submit to the Commission a national market system plan to create, implement, and maintain a consolidated audit trail (the ''CAT'').[92] The goal of Rule 613 was to create a modernized audit trail system that would provide regulators with more timely access to a sufficiently comprehensive set of trading data, thus enabling regulators to more efficiently and effectively reconstruct market events, oversee market behavior, and investigate misconduct. On November 15, 2016, the Commission approved the national market system plan required by the CAT NMS Plan.[93]

Section 6.4(d) of the CAT NMS Plan provides that each Participant, through its Compliance Rule,[94] must require Industry Members [95] to record and electronically report certain information to the CAT Central Repository, which means that any broker-dealer that is a member of a national securities exchange or a member of a national securities association must report the lifecycle of an order from original receipt or origination, modification, cancellation, routing, execution (in whole or in part) and allocation of an order, and receipt of a routed order to the CAT.[96] This provides regulators, including the Commission, access to comprehensive information regarding the lifecycle of orders, from origination to execution, as well as the post-execution allocation of shares.

Broker-dealers, through the Compliance Rule adopted pursuant to the CAT NMS Plan, are required to report some short sale order data, including for sell orders, whether an order is long, short, or short exempt,[97] but not other short sale order data, including when a buy order is designed to close out an existing short position, or whether a market participant is relying on the bona fide market making exception of the Regulation SHO locate requirement in Rule 203. To supplement the short sale related data that would be reported by Managers to the Commission pursuant to Proposed Rule 13f–2 and on Proposed Form SHO, the Commission now believes it is appropriate to amend the CAT NMS Plan to require the Participants to require CAT reporting firms to report certain additional short sale related data to the CAT, as discussed below.

A. ''Buy to Cover'' Information

First, the Commission proposes that Industry Members be required to report to the CAT ''buy to cover'' information, which would be collected pursuant to Regulation SHO through Proposed Rule 205 as discussed in Part IV above. Specifically, the Commission proposes to amend Section 6.4(d)(ii) of the CAT NMS Plan by adding new subparagraph 6.4(d)(ii)(D) which would require the Participants to update their Compliance Rules to require Industry Members to report for the original receipt or origination of an order to buy an equity security, whether such buy order is for an equity security that is a ''buy to cover'' order as defined by Rule 205(a) of Regulation SHO (17 CFR 242.205(a)).[98] This provision would require Industry Members to identify ''buy to cover'' equity orders received or originated by Industry Members and Customers [99] as ''buy to cover'' orders in order receipt and order origination reports submitted to the CAT Central Repository.

The originally proposed CAT NMS Plan would have required all CAT Reporters (*i.e.,* Participants and Industry Members) to report an ''open/close indicator'' as a ''Material Term'' on all orders, as required by Rule 613.[100] This open/close indicator could have been used to identify ''buy to cover'' equities orders, because it would have provided information on whether an order is to open or close an existing position in a security. However, when the Commission approved the CAT NMS Plan, it determined that it was appropriate to remove the proposed requirement that an open/close indicator be reported as part of the Material Terms of the Order for equities and Options Market Maker quotations.[101] At the time, three commenters objected to the requirement that CAT Reporters report an open/close indicator for equities transactions. Among other things, commenters noted that an ''open/close indicator'' is not used for equities, and believed that an additional or separate cost-benefit analysis should be done before it be required for equities.[102] One of these commenters stated that including an ''open/close indicator'' for equities would require ''significant process changes and involve parties other than CAT Reporters, such as buy-side clients, OMS/EMS vendors, and others.'' [103] Ultimately, the Commission decided that limiting the open/close indicator to

[91] The Participants include: BOX Exchange LLC; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors' Exchange LLC; Long-Term Stock Exchange, Inc.; MEMX LLC; Miami International Securities Exchange LLC; MIAX Emerald, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE American LLC; NYSE Arca, Inc.; NYSE Chicago, Inc.; and NYSE National, Inc.

[92] *See* Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (Aug. 1, 2012) (''Rule 613 Adopting Release'').

[93] Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696, (Nov. 23, 2016) (''CAT NMS Plan Approval Order''). The CAT NMS Plan is Exhibit A to the CAT NMS Plan Approval Order. *See* CAT NMS Plan Approval Order, 81 FR at 84943–85034. The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (the ''Company''). Each Participant is a member of the Company and jointly owns the Company on an equal basis. The Participants submitted to the Commission a proposed amendment to the CAT NMS Plan on August 29, 2019, which they designated as effective on filing. Under the amendment, the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC serves as the CAT NMS Plan, replacing in its entirety the CAT NMS Plan. *See* Exchange Act Release No. 87149 (Sept. 27, 2019), 84 FR 52905 (Oct. 3, 2019).

[94] ''Compliance Rule'' means, with respect to a Participant, the rule(s) promulgated by such Participant as contemplated by Section 3.11 of the CAT NMS Plan. *See* CAT NMS Plan, Section 1.1.

[95] An ''Industry Member'' means a member of a national securities exchange or a member of a national securities association. *See* CAT NMS Plan, Section 1.1.

[96] ''Central Repository'' means a repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to Rule 613 of Regulation NMS and the CAT NMS Plan. *See* CAT NMS Plan, Section 1.1.

[97] Section 1.1 of CAT NMS Plan defines ''Material Terms of the Order,'' which includes, for sell orders, ''whether the order is long, short, [or] short exempt[.]''

[98] *See* Proposed Section 6.4(d)(ii)(D) of the CAT NMS Plan; Proposed Rule 205(a) of Regulation SHO, 17 CFR 242.205(a)).

[99] Section 1.1 of the CAT NMS Plan defines the term ''Customer'' as (a) the account holder(s) of the account at a registered broker-dealer originating the order; and (b) any person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s). *See also,* 17 CFR 242.613(j)(3).

[100] *See* 17 CFR 242.613(j)(7) (defining ''Material Terms of the Order'' to include ''open/close indicator''); Exchange Act Release No. 77724 (Apr. 27, 2016); 81 FR 30614, 30680 (May 17, 2016).

[101] *See* CAT NMS Plan Approval Order, 81 FR at 84747.

[102] *See id.*

[103] *See id.*

listed options was ''reasonable,'' acknowledging concerns in other areas, ''including the lack of a clear definition of the term for equities transactions.'' [104]

The Commission believes it is now appropriate to require ''buy to cover'' CAT reporting by Industry Members. Unlike the ''open/close indicator'' requirement in Rule 613, which was included in the definition Material Terms of the Order, the Commission is proposing to only require reporting by Industry Members on a subset of CAT reports related to equity buy orders; specifically, order receipt and order origination reports. Pursuant to the CAT NMS Plan, Material Terms of the Order are required to be reported to the CAT for numerous other events in an order's lifecycle, including routing of an order, receipt of an order that has been routed, order modifications, order cancellations, and executions of orders, in whole or in part.[105] In addition, the proposed provisions only require ''one-sided'' CAT reporting—that is, except in circumstances where an Industry Member originates a ''buy to cover'' order and submits it to another Industry Member as a Customer (requiring both Industry Members to report ''buy to cover'' information as part of order origination and order receipt reports, respectively), only one CAT Reporter is required to report that an order is a ''buy to cover'' order to the CAT. In addition, the ''buy to cover'' information does not have the same definitional issues as an ''open/close indicator'' because ''buy to cover'' is being added to Regulation SHO, as discussed in Part IV above. ''Buy to cover'' is also a more narrow concept than an ''open/close indicator'' and would require only a change to CAT reporting for a subset of equity buy orders, and thus would not affect CAT reporting for a majority of equity orders, and would not change CAT reporting relating to options trading at all. Because of this, the costs associated with the reporting of ''buy to cover'' information to the CAT should be substantially less than the costs of reporting an ''open/close indicator'' would have been.

The Commission believes that requiring proposed reporting of ''buy to cover'' information to the CAT would provide valuable information for the Commission and other regulators in investigations and reconstruction of market events. The Commission and regulators currently do not have ready access to ''buy to cover'' information because they do not regularly receive Industry Member and customer position information, and it is only possible to identify ''buy to cover'' orders if the Commission or regulators independently obtain position information, such as by obtaining trade data and blotters from Industry Members. Even then, it is difficult to identify and track equity orders that are ''buy to cover.'' Ready access to ''buy to cover'' information in the CAT would allow regulators to more easily determine whether a purchase of an equity security increases the equity exposure of an Industry Member or Customer and whether the buy covers a short position. Ready access to information used to determine whether an order adds to an existing position or covers an existing short position would assist in detecting and investigating portfolio pumping, short selling abuses, short squeezes marking the close, potential manipulation, insider trading, or other rule violations, such as violations of Rule 105 of Regulation M, which generally governs when short sellers can participate in a follow-on offering.[106] This information would also enhance the Commission staff's and regulators' analysis and interpretations of the impact short selling and ''buys to cover'' have on the market, by more accurately lining up trading activity data available in the CAT with security price changes to examine and study the impact of ''short squeezes'' on equity prices.

B. Reliance on Bona Fide Market Making Exception

The Commission also proposes to require CAT reporting firms that are reporting short sales to indicate whether such reporting firm is asserting use of the bona fide market making exception under Regulation SHO for the locate requirement in Rule 203 for the reported short sales. Specifically, the Commission proposes to amend Section 6.4(d)(ii) of the CAT NMS Plan to add a new subparagraph (E) which would require Participants to update their Compliance Rules to require Industry Members to report to the CAT, for the original receipt or origination of an order to sell an equity security, whether the order is a short sale effected by a market maker in connection with bona-fide market making activities in the security for which the exception in Rule 203(b)(2)(iii) of Regulation SHO is claimed.[107] The Commission believes that this information would provide valuable data to both the Commission and other regulators regarding the use of this exception by market participants, an exception which allows a broker-dealer (and consequently, a short seller) to avoid or delay certain requirements of Regulation SHO, including the locate and close out requirements.

Rule 203(b)(1) of Regulation SHO generally prohibits a broker-dealer from accepting a short sale order in an equity security from another person, or effecting a short sale in an equity security for its own account, unless the broker-dealer (i) has borrowed the security, (ii) has entered into a bona-fide arrangement to borrow the security, or (iii) has reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due.[108] This is generally referred to as the locate requirement. Rule 203(b)(2) of Regulation SHO provides an exception to the locate requirement for short sales effected by a market maker in connection with ''bona fide'' market making activities.[109] To qualify for the bona fide market making exception, however, a firm must be engaged in bona fide market making at the time of the short sale in question.[110] The Commission adopted this narrow exception to Regulation SHO's locate requirement for market makers that may need to facilitate customer orders in a fast moving market without possible

[104] *See id.* The Commission believes that the proposed reporting requirements here do not have the same issue regarding the lack of a clear definition because, unlike simply requiring an ''open/close indicator,'' the proposed reporting requirements more clearly define when a ''buy to cover'' indicator would be required to be reported.

[105] *See* Section 6.3(d) and 6.4(d) of the CAT NMS Plan. Because ''buy to cover'' information will only be available on order receipt and order origination reports, Commission staff and regulators will have to do more analysis to identify certain CAT records (*e.g.,* order routes, modifications, cancellations, and executions) as associated with a ''buy to cover'' order since Industry Members would not be required to report ''buy to cover'' information on these CAT reports, but the Commission believes this inefficiency is justified by the reduction in burden of reporting for Industry Members.

[106] 17 CFR 242.105.

[107] *See* proposed Section 6.4(d)(ii)(E) of the CAT NMS Plan.

[108] 17 CFR 242.203(b)(1).

[109] 17 CFR 242.203(b)(2). The Commission has provided guidance on indicia of bona fide market making activities eligible for the locate exception. *See* Regulation SHO Adopting Release, *supra* note 4 (setting forth examples of activities that would not be considered to be bona fide market making activities); *see also,* Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690, 61698–99 (Oct. 17, 2004) (adopting amendments to Regulation SHO and providing additional guidance on what constitutes bona fide market making). Whether activity is considered bona fide market making activity for purposes of Regulation SHO will ''depend on the facts and circumstances of the particular activity'' in question, and only market makers engaged in bona fide market making activity in the security at the time they effect a short sale are eligible for the locate exception. *See id.* at 61699.

[110] *See id.* at 61699.

delays associated with complying with such a requirement.[111]

The Commission previously proposed to require a locate identifier for short sales to be reported to the CAT in Rule 613, but removed this requirement, among others, from the adopted rule text.[112] At the time, the Commission believed that the CAT would still achieve significant benefits without requiring the routine recording and reporting of these specific data elements to the CAT, that the Commission could obtain information from a broker-dealer in a follow-up request if necessary, and that the benefits of having these specific data elements in the CAT would be minimal.[113] However, with greater experience and access to CAT Data, the Commission now believes that it is important for regulatory and surveillance purposes to capture information regarding the use of the narrow bona fide market making exception to Regulation SHO and no longer believes that the benefits of having this specific data element in the CAT would be minimal. The Commission also believes that requiring this reporting would impact substantially fewer CAT Reporters than the original Rule 613 proposal, which would have required locate identifiers for all short sales.

There are a number of settled enforcement actions against firms in connection with their use of the exception.[114] Firms are not permitted to use the bona fide market making exception for, among other things, speculative selling strategies or investment purposes of the broker-dealer that are disproportionate to the usual market making patterns or practices of the broker-dealer in that security.[115] Firms that do not need to obtain a locate prior to effecting a short sale, on the basis of the bona fide market making exception, have a competitive advantage over firms that are required to obtain a locate because these firms can trade more quickly and more easily adjust to or take advantage of changing market conditions. Currently, the Commission must request information from a broker-dealer to determine which orders have been submitted pursuant to the bona fide market making exception. The Commission believes that requiring Industry Members to identify short sales for which they are claiming the bona fide market making exception would provide the Commission and other regulators an additional tool to determine whether such activity qualifies for the exception, or instead could be indicative of, for example, proprietary trading instead of bona fide market making.[116]

While Regulation SHO does not require market maker firms to record whether they are relying upon the exception in Rule 203(b)(2)(iii) of Regulation SHO for bona fide market making activity, the Commission believes that market maker firms that engage in equity trading should be able to identify what trading activity qualifies for the exception so a firm can demonstrate its eligibility for the asserted exception. Thus, the Commission believes that this information should be easily reportable to the CAT by Industry Members that do rely upon this exception. As noted above, there is a narrow exception to Regulation SHO's locate requirement for bona fide market making in Rule 203(b)(2)(iii), and a firm should know at the time that it submits a sell short order without performing a locate pursuant to the bona fide market making exception whether or not it qualifies for the exception.

C. Request for Comments

While the Commission welcomes any public input on the Proposal to Amend CAT, the Commission asks commenters to consider the following questions.

- Q18: *Proposal to Amend CAT:* Under the Proposal to Amend CAT, Industry Members would be required to report certain additional short sale related data to the CAT, as described above.

○ Are the proposed reporting requirements related to ''buy to cover'' and the bona fide market making exception sufficiently clear and understandable to allow Industry Members to collect and report the necessary information? Are the proposed requirements sufficiently clear for the Participants to implement the necessary changes to their Compliance Rules? Are the proposed requirements sufficiently clear for the CAT Plan Processor to implement necessary systems and technical changes and implement revised technical or other specifications required to facilitate and allow for the reporting of these new CAT data elements?

○ Please describe any technical challenges or concerns relating to the reporting, capture and processing of the proposed new information.

○ Are there concerns relating to the collection of ''buy to cover'' information by executing brokers to report to the CAT? What difficulties would Industry Members face in reporting their own proprietary ''buy to cover'' orders? Customer ''buy to cover'' orders? Are there other concerns relating to the reporting of ''buy to cover'' information to the CAT? If so, please describe those concerns and the specific issues or other burdens that should be considered by the Commission.

○ Are there concerns relating to the collection of or reporting reliance on the bona fide market making exception of Regulation SHO to the CAT? Would it be difficult for market making firms to identify what orders are originated pursuant to the bona fide market making exception? If so, please describe those concerns and the specific issues or other burdens that should be considered by the Commission.

○ The proposal would require broker-dealers to identify, at order origination, whether they are asserting use of the bona fide market making exception to the locate requirement. Should the Commission also require identification of purchases by broker-dealers to close out fails to deliver resulting from bona fide market making under Rule 204 of

[111] *See* Regulation SHO Adopting Release, *supra* note 4, at 48015 n.67.

[112] *See* Rule 613 Adopting Release, 77 FR at 45751.

[113] *See id.*

[114] *See, e.g.,* In the Matter of Wilson-Davis & Company, Inc., Respondent, Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Release No. 80533 (April 26, 2017) (settled matter); In the Matter of Jeffrey A. Wolfson, Robert A. Wolfson, and Golden Anchor Trading II, LLC (n/k/a Barabino Trading, LLC), Respondents, Order Making Findings and Imposing Remedial Sanctions and Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 as to Robert A. Wolfson and Golden Anchor Trading II, LLC (n/k/a Barabino Trading, LLC), Release No. 67450 (July 17, 2012) (settled matter).

[115] *See* Regulation SHO Adopting Release, *supra* note 4, at 48015.

[116] Depending on the circumstances, the proposed requirement to report the use of the bona fide market making exception to Regulation SHO at order initiation could either reduce or increase compliance costs to market participants. In some cases, for example, examiners identifying market participants for examination of prolonged fails to deliver would be able to readily determine that such fails were due to bona fide market making activity, obviating the need to examine the particular market participant based on such fails alone. In other circumstances, by contrast, an indication of reliance on the bona fide market maker exception could be flagged for examination if it appears that the market participant is unlikely to be engaging in bona fide market making activities to the extent of the fails to deliver that have occurred—for instance, a market participant that does not post any quotes in the security for which the fails are occurring that has indicated it is relying on the bona fide market making exception in Regulation SHO. The Commission does not believe requiring the indicator will have a chilling effect on market making generally. Rather, the indicator will be used to identify whether a short sale for which a market participant is asserting the bona fide market making exception has been effected in connection with bona fide market making activities such that the narrow exception to a narrow exception to the locate requirement of Regulation SHO applies.

Regulation SHO?[117] If so, please describe the costs and benefits of such an approach.

○ Is there any other short sale related data that should be reported to the CAT? If so, please describe the costs and benefits of reporting that data.

• Q19: *Cost of Reporting:* Under the Proposal to Amend CAT, Industry Members would be required to report certain additional short sale related data to the CAT, as described above.

○ Please describe any views related to the anticipated costs or other burdens, as well as benefits, associated with reporting under the Proposal to Amend CAT, and identify the specific costs or other burdens that should be considered by the Commission.

VII. Paperwork Reduction Act Analysis

A. Background

Certain provisions of Proposed Rule 13f–2, Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT contain new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[118] The Commission is submitting the proposed collection of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[119] The title for the collection of information is: ''Proposal to Enhance Short Sale Data.'' OMB has not yet assigned a control number to the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The requirements of this collection of information are mandatory for Managers under Proposed Rule 13f–2 and Proposed Form SHO, for broker-dealers under Proposed Rule 205, and Plan Participants and CAT reporting firms under the Proposal to Amend CAT.

As discussed above,[120] Proposed Rule 13f–2 and related Proposed Form SHO are designed to provide greater transparency of short sale related data to regulators, investors and other market participants by requiring certain Managers to file monthly on Proposed Form SHO, through EDGAR in Proposed Form SHO-specific XML, certain short position and activity data. Under Proposed Rule 13f–2 and Proposed Form SHO, only those Managers that meet a specified Reporting Threshold for an equity security would be required to file Proposed Form SHO.

Proposed Rule 205 would establish a new ''buy to cover'' order marking requirement for purchase orders effected by a broker-dealer that applies if, at the time of order entry, the account for which the purchase order is placed has a gross short position in the security being purchased.[121] Such information would provide additional context to the Commission and other regulators regarding the lifecycle of short sales, would assist in reconstructing market events, and would be useful in identifying and investigating potentially abusive short selling practices. The Commission believes that many broker-dealers will have existing order marking systems and processes, and will be familiar with how to adapt and update them to accommodate new order marks.

The Proposal to Amend CAT is intended to supplement the short sale related data that would be reported by certain Managers to the Commission pursuant to Proposed Rule 13f–2 and Proposed Form SHO. As discussed above, the Commission proposes that CAT reporting firms be required to report ''buy-to-cover'' information to the CAT and believes that this information would allow Commission and SRO staff to review the life of a short sale, from creation to termination, which would assist in reconstructing unusual market events such as the market volatility in early 2021.[122] In addition, the Commission proposes to require CAT reporting firms that are reporting short sales to indicate whether such reporting firm is asserting use of the bona fide market making exception for the ''locate'' requirement in Rule 203 under Regulation SHO for the reported short sales. The Commission believes that this information would provide valuable data to both the Commission and other regulators regarding the use of the bona fide market making exception by market participants. The Proposal to Amend CAT could potentially affect all CAT reporting firms, but the Commission believes that the proposal will primarily affect those CAT reporting firms that engage in short sale activity with subsequent purchases to cover such short positions.

Given the differences in the information collections applicable to these parties, the burdens applicable to Managers, broker-dealers and CAT reporting firms are separated in the analysis below.

B. Burdens for Managers Under Proposed Rule 13f–2 and the Related Proposed Form SHO

1. Applicable Respondents

As discussed above, Proposed Rule 13f–2 and Proposed Form SHO would require Managers that trigger a Reporting Threshold to file monthly via EDGAR, on Proposed Form SHO, certain short position and activity data. Under Section 13(f)(6)(A) of the Exchange Act and for purposes of Proposed Rule 13f–2, Managers would include any person, other than a natural person, investing in or buying and selling securities for its own account, and any person (including a natural person) exercising investment discretion with respect to the account of any other person.[123] Thus, the requirements of Proposed Rule 13f–2 could apply, for example, to investment advisers that exercise investment discretion over client assets, including investment company assets; broker-dealers; insurance companies; banks and bank trust departments; and pension fund managers or corporations that manage corporate investments or employee retirement assets. Of those, the Commission estimates that, each month, approximately 1,000 Managers would trigger a Reporting Threshold for at least one security, and therefore be required to file a Proposed Form SHO.[124]

2. Burdens and Costs

The Commission believes that the burden associated with Proposed Rule

[117] Rule 204 requires a participant of a registered clearing agency to deliver securities to a registered clearing agency for clearance and settlement on a long or short sale transaction in any equity security by settlement date, or to immediately close out a failure to deliver by borrowing or purchasing securities of like kind and quantity by the applicable close out date. For a short sale, a participant must close out a failure to deliver by no later than the beginning of regular trading hours on T+3. For a long sale, or for activity that is attributable to ''bona fide'' market making activities, a participant must close out a failure to deliver by no later than the beginning of regular trading hours on T+5.

[118] 44 U.S.C. 3501 *et seq.*

[119] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[120] *See supra* Part III.A.

[121] *See supra* Part V.

[122] *See supra* Part VI.A.

[123] *See also* Instructions to Form 13F.

[124] This estimate is similar to the estimate provided in the *Disclosure of Short Sales and Short Positions by Institutional Investment Managers,* 73 FR at 61686. However, the number of estimated Proposed Form SHO filers represents a monthly, as opposed to weekly, filing, and therefore the Commission estimates fewer overall filings per month. Additionally, the estimate accounts for the estimate by the Commission staff that 346 Form SH filers would have been required to file had a threshold of 2.5% of shares outstanding or $10 million position dollar value been imposed during the analyzed time period. The estimate of 1,000 is higher than the 346 estimated Form SH filers to account for: (1) Managers with discretion over less than $100 million, which were not required to file Form SH; (2) the fact that Form SH was only required to be filed for 13(f) securities as opposed to all equity securities of both reporting and non-reporting issuers; and (3) the fact that Form SH did not include a second, lower threshold (Threshold B) for short positions in securities of non-reporting issuers.

13f–2 and the related Proposed Form SHO reporting in EDGAR would be similar to a Manager's reporting requirements for former Form SH. In October 2008, the Commission adopted interim temporary Rule 10a-3T, which required institutional investment managers that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of at least $100 million to file Form SH with the Commission following a calendar week in which it effected a short sale in a Section 13(f) security, with some exceptions. Form SH included information on short sales and positions of Section 13(f) securities, other than options.[125] With respect to each applicable Section 13(f) security, the Form SH filing identified the issuer and CUSIP number of the relevant security and required the Manager's start of day short position, the number and value of securities sold short during the day, the end of day short position, the largest intraday short position, and the time of the largest intraday short position.[126] In adopting interim temporary Rule 10a-3T, which required certain Managers to file weekly nonpublic reports via Form SH, the Commission believed that Managers would spend an estimated 20 hours to prepare and file each Form SH.[127]

While recognizing that the information required under former Form SH differs from that required under Proposed Form SHO, the Commission believes that both forms require the reporting of short sale related data of similar depth and complexity.[128] However, Proposed Rule 13f–2 would require monthly reporting if certain conditions are met, as opposed to the weekly reporting required by Form SH for Managers that effected short sales within the preceding week,[129] which is anticipated to decrease the overall volume of reports required to be filed by Managers. Accordingly, the Commission believes that the burden associated with preparing and filing Proposed Form SHO in EDGAR would be approximately 20 hours per filing, consistent with that of former Form SH. The Commission further estimates that Managers would collectively spend approximately 240,000 hours per year to comply with the reporting requirements of Proposed Rule 13f–2.[130] The Commission estimates that the hourly cost of internal expertise required for each filing would be $217.55, which includes a blended calculation of the estimated hourly rate for a compliance attorney, senior programmer, and in-house compliance clerk.[131] Taken together the estimated burden hours and hourly rate for the filing of Proposed Form SHO result in an estimated annual cost to the industry of $52,212,000.[132] The Commission, however, recognizes that advances in technology over time could result in Managers spending less time preparing and filing Proposed Form SHO than is estimated above.[133]

The Commission also anticipates that most Managers will file Proposed Form SHO directly in the structured XML-based data language for Proposed Form SHO,[134] rather than using the fillable web form provided by EDGAR, resulting in some limited additional costs for each filing.[135] The Commission believes that Managers that file Proposed Form SHO using a structured XML-based data language could incur an additional burden of 2 hours of work by a programmer,[136] at an estimated cost of $540.[137] The Commission further estimates that Managers would collectively spend up to approximately 24,000 hours and $6,480,000 per year to file Proposed Form SHO directly in a structured XML-based data language.[138] The Commission also estimates that a similar, additional burden of 2 hours of work by a programmer per filing would apply to Managers filing an amended Form SHO directly in a structured XML-based data language.

The Commission estimates that approximately 3.5% of the Managers that file Proposed Form SHO each month would also file an amended Proposed Form SHO, resulting in an

[125] *See supra* note 35.

[126] Form SH was adopted in the wake of the 2008 financial crisis, and remained in effect until July 2009.

[127] *See Disclosure of Short Sales and Short Positions by Institutional Investment Managers,* 73 FR at 61686 (Stating that, ''[t]he 20 hour per filing estimate is based on data received from a small sample of actual filers and a random sample of filings conducted by our Office of Economic Analysis.'').

[128] Under Form SH, Managers who met the applicable threshold and effected a short sale in a Section 13(f) security in the preceding week were required to file a report identifying the opening short position, closing short position, largest intraday short position, and the time of the largest intraday short position, for that security during each calendar day of the prior week. Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175, 55176 (Sept. 24, 2008).

[129] *See id.*

[130] 20 hours per filing × 1,000 filings by Managers each month × 12 months = 240,000 hours.

[131] The $217.55 wage rate reflects current estimates of the blended hourly rate for an in-house compliance attorney ($368), a senior programmer ($334) and in-house compliance clerk ($71). $217.55 is based on the following calculation: (($368) + (((($334 + $71) ÷ 2) × 10)) ÷ 11 = $217.55. The estimated proportion of compliance attorney (1/11th) to senior programmer and in-house compliance clerk (10/11ths) time burden is based on commenter input and computation of the estimated burden for the filing of Form 13F–HR. *See Electronic Submission of Applications for Orders,* Exchange Act Release No. 93518 (Nov. 4, 2021), 86 FR 64839 (Nov. 19, 2021) at 64860–61 (''Electronic Submission of Applications for Orders''). The $368 per hour and $334 per hour figures for a compliance attorney and a senior programmer, respectively, are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013 (''SIFMA Report''), modified by Commission staff to account for an 1800-hour work year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The $71 per hour figure for a compliance clerk is based on salary information from the SIFMA Report, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. *See* Exchange Act Release No. 89290 (July 10, 2020), 85 FR 46016 (July 31, 2020) (''Proposed Reporting Threshold for Institutional Investment Managers'').

[132] 20 hours per filing × 1,000 filings by Managers each month × 12 months × $217.55 per hour = $52,212,000.

[133] *See Electronic Submission of Applications for Orders,* 86 FR at 64859 (stating that ''[c]ommenters stated that the advances in technology have made the process of completing and filing Form 13F highly automated, reducing the time and external costs to managers in complying with this requirement.'').

[134] The Commission believes most Managers would be familiar with other EDGAR Form-specific XML data languages, the use of which is required for the filing (by Managers that exercise investment discretion with respect to accounts holding 13(f) Securities having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million) of Form 13F. *See* Frequently Asked Questions About 13F, *available at https://www.sec.gov/divisions/investment/13ffaq.htm.* In order to achieve a conservative estimate of industry costs, the Commission estimates that all of the 1,000 Managers estimated to file Proposed Form SHO each month will do so directly using the structured XML-based data language rather than the fillable web form provided by EDGAR.

[135] *See* Investment Company Act Release No. 34441 (Dec. 15, 2021) (proposing release) at 123–125, *available at https://www.sec.gov/rules/proposed/2021/ic-34441.pdf* (stating that, in the context of money market funds filing Form N–CR, the use of the XML-based data language for that Form may result in ''some additional reporting costs related to adjusting their systems to a different data language'' but that such changes ''may reduce costs and introduce additional efficiencies for money market funds already accustomed to reporting using structured data and may reduce overall reporting costs in the longer term.'').

[136] The 2 hour estimated burden is consistent with similar estimates for the use of structured XML data formats for the filing of Form N–CR and Form 24F–2. *See* Investment Company Act Release No. 34441 (Dec. 15, 2021) at 282 Table 10. *See also,* Exchange Act Release No. 88606 (Apr. 8, 2020), 85 FR 33290, 33329 n.439 (June 1, 2020) (stating that ''[w]e assume that the burden of tagging Form 24F–2 in a structured XML format would be 2 hours for each filing.'').

[137] Based on industry sources, Commission staff previously estimated that the average hourly rate for technology services in the securities industry (outside senior programmer or systems programmer) is $270. *See* Exchange Act Release No. 83062 (Apr. 18, 2018), 83 FR 21574, 21653 n.493 (May 9, 2018) (''Regulation Best Interest Proposing Release'').

[138] 2 hours per filing × $270 per hour × 1,000 filings each month × 12 months = $6,480,000.

additional burden and cost for an estimated 35 Managers each month.[139] The additional burden could take up to the original 20 hours to process and file, as it would require the filing of an entirely new Proposed Form SHO.[140] The associated wage rate would also be consistent with the cost of expertise required to complete the original Proposed Form SHO, estimated to be $217.55 per hour.[141] The Commission also estimates that each amended Proposed Form SHO would be filed directly using a structured XML-based data language, resulting in a corresponding additional burden of 2 hours of work by a programmer per amended Proposed Form SHO filing.

PRA Table 1—Estimated Manager Burden and Costs Associated With Proposed Form SHO Reporting

	Managers (monthly)	Proposed Form SHO reports processed and filed (annual)	Hours needed to process and file Proposed Form SHO (avg.)	Total industry burden hours to process and file Proposed Form SHO (annual)	Wage rate (Avg.)	Total industry cost burden (annual)
Proposed Form SHO Filings	1,000	12,000	20	240,000	$217.55	$52,212,000
Use of Structured XML-Based Data Language	1,000	12,000	2	24,000	270	6,480,000
Amended Proposed Form SHO Filings	35	420	20	8,400	217.55	1,827,420
Use of Structured XML-Based Data Language	35	420	2	840	270	226,800
Total				273,240		60,746,220

In addition to the costs associated with the reporting burden, the Commission believes that Managers could incur an initial technology-related burden of 325 hours, at an hourly estimated wage rate of $320.30,[142] for an estimated total cost of $104,097.50 per Manager,[143] to update their current systems to capture the required information, and automate and facilitate the completion and filing of Proposed Form SHO. The Commission generally believes that the type of Managers that would trigger a Reporting Threshold would likely have sophisticated technologies and would be able to implement systems to help automate the reporting requirements of Proposed Rule 13f–2. In particular, the estimate of 325 initial technology-related burden hours for Managers filing Proposed Form SHO is based on the estimated initial filing burden (325 hours) for large hedge fund advisers [144] to fulfill proposed amendments to the reporting requirements for Form PF,[145] and is similar to the initial technological infrastructure-related burden (355 hours) for the proposed security-based swap position reporting requirements of proposed Rule 10B–1(a).[146] While Managers most likely have other existing reporting obligations, the Commission recognizes that Managers may need to update their systems to ensure timely and accurate filing of the specific information required under Proposed Form SHO.

PRA Table 2—Estimated Manager Burden and Costs Associated With Proposed Form SHO Initial Technology Projects

	Managers with proposed Form SHO reportable short interest positions	Number of hours needed for initial technology projects (avg.)	Industry burden hours for initial technology projects	Wage rate (avg.)	Total industry cost burden
Proposed Form SHO Initial Technology Projects	1,000	325	325,000	$320.30	$104,097,500

In making its estimates for the population of Managers that may be required to file a Proposed Form SHO, the Commission notes that its estimate may be over-inclusive of the number of Managers that can reasonably be expected to be covered. This is highlighted by the estimate that only 346 Form SH filers would have had to file a report if one of the proposed Reporting Thresholds for Proposed Form SHO—$10 million or 2.5% of

[139] The estimate of 3.5% of Regulation SHO filers that are anticipated to file an amended Proposed Form SHO is based on the frequency of recent filings of amended Form 13F. *See* Exchange Act Release No. 93518 (Nov. 4, 2021), 86 FR 64839, 64860–61 Table 5 Notes 7, 8, and 10 (Nov. 19, 2021) (estimating a total of 5,466 Form 13F–HR filings, 1,535 Form 13F–NT filings, and 244 Form 13F amendment filings (244 ÷ 7,001 = 3.5%) and noting that ''[t]his estimate is based on the number of Form 13F amendments filed as of December 2019.'').

[140] *See* Form SHO, Special Instructions at 4.

[141] *See supra* note 131.

[142] The Commission estimates that, of a total estimated burden of 325 hours, approximately 195 hours will most likely be performed by compliance professionals and 130 hours will most likely be performed by programmers working on system configuration and reporting automation. Of the work performed by compliance professionals, we anticipate that it will be performed equally by a compliance manager at a cost of $316 per hour and a senior risk management specialist at a cost of $365 per hour. Of the work performed by programmers, we anticipate that it will be performed equally by a senior programmer at a cost of $334 per hour and a programmer analyst at a cost of $246 per hour. (((($316 per hour × 0.5) + ($365 per hour × 0.5)) × 195 hours) + (((($334 per hour × 0.5) + ($246 per hour × 0.5)) × 130 hours) ÷ 325 = $320.30.

[143] 325 initial technology-related burden hours × $320.30 per hour = $104,097.50.

[144] *See Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers,* Investment Act Release No. 5950 (Jan. 26, 2022), 87 FR 9106 (Feb. 17, 2022) (The Commission recognizes that Proposed Rule 13f–2 would cover persons other than large hedge fund advisers, and that large hedge fund advisers may generally be more accustomed to existing Commission reporting requirements than some other persons that would be covered by Proposed Rule 13f–2.).

[145] *See id.* at 9140 Table 2.

[146] *See* Exchange Act Release No. 93784 (Dec. 15, 2021), 87 FR 6652, 6678 (Feb. 4, 2022).

outstanding shares—were to be applied.[147] However, Form SH represented a narrower population of potential filers (*e.g.,* only those that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of at least $100 million) than prospective Proposed Form SHO filers. Form SH also applied to a narrower population of securities, 13(f) securities, than Proposed Form SHO, which is proposed to apply more broadly to all equity securities.[148] Additionally, Proposed Rule 13f–2 will include a second Reporting Threshold (Threshold B) that applies to short positions in non-reporting company issuers, which could result in additional Managers having to file a Proposed Form SHO. The number of Managers with accounts containing short positions big enough to trigger either of the proposed threshold prongs for Proposed Form SHO may have increased in the thirteen years since Form SH was implemented, particularly if overall shorting activity has increased. The Commission also recognizes that technological innovation and automation can change quickly, providing for new opportunities to streamline processes and reduce both initial and ongoing burdens and costs. Thus, the Commission seeks specific comment as to whether the proposed burden estimates are appropriate or whether such estimates should be increased or reduced. The Commission invites comment on the estimated number of Managers anticipated to be required to file a Proposed Form SHO each month (1,000), the estimated time burden (20 hours) of preparing and filing each required Proposed Form SHO, and the estimated initial time burden (325 hours) for Managers to update their systems and technology to facilitate the filing of Proposed Form SHO. The Commission also invites comment on the estimated number of Managers that will file Proposed Form SHO each month directly in Proposed Form SHO-specific XML (1,000), the estimated associated additional burden (2 hours of work by a programmer) for each filing, and whether the burden is more accurately categorized as an ongoing per filing burden or an initial, one-time technological systems update burden. If those estimates or any other element of Proposed Rule 13f–2 and Proposed Form SHO burdens or costs should be increased or decreased, please address by how much and why.

C. Burdens for Broker-Dealers Under Proposed Rule 205

1. Applicable Respondents

As discussed above, Proposed Rule 205 would add a new ''buy to cover'' marking requirement for a broker-dealer effecting a purchase order for its own account or on behalf of another person, wherein the account has a gross short position in the security being purchased. Proposed Rule 205 would require that, regardless of the size of such purchase for such account, the broker-dealer mark the purchase ''buy to cover.'' All broker-dealers whose accounts or whose customers' accounts at the broker-dealer could hold a short position are potentially subject to the requirements of Proposed Rule 205. As of December 31, 2020, there were 3,551 broker-dealers registered with the Commission.[149] The Commission estimates that of the 3,551 registered broker-dealers, 1,218 place orders that would require a ''buy to cover'' order mark.[150]

2. Burdens and Costs

For purposes of the PRA, the Commission staff estimates that a total of approximately 62.25 billion ''buy to cover'' orders would be entered annually.[151] This would make for an average of approximately 51.1 million annual ''buy to cover'' order marks by each broker-dealer anticipated to require a ''buy to cover'' order mark.[152] Each instance of marking an order ''buy to cover'' is estimated to take between approximately .00001158 and .000139 hours (.042 and .5 seconds) to complete.[153] This estimate is based on a number of factors, including: previously estimated burdens for the current marking requirements of Rule 200(g) of Regulation SHO requiring broker-dealers to mark sell orders ''long,'' ''short,'' or ''short exempt''; broker-dealers should already have the necessary mechanisms and procedures in place and already be familiar with processes and procedures to comply with the marking requirements of Rule 200(g) of Regulation SHO; broker-dealers should be able to continue to use the same or similar mechanisms, processes and procedures to comply with Proposed Rule 205; and that computing speeds have significantly improved since the initial order marking burdens of Rule 200(g) of Regulation SHO were initially estimated.

PRA Table 3—Estimated Broker-Dealer Burden Associated With ''Buy to Cover'' Order Marking

	Broker-Dealers that may ''buy to cover''	Annual ''buy to cover'' orders	Burden hours per ''buy to cover'' order	Total annual industry burden hours	Annual burden per broker-dealer
''Buy to Cover'' Order Marking ..	1,218	62.25 billion	.00001158 (.042 seconds) to .000139 (.5 seconds).	721,000 to 8,652,750	592 to 7,104.

[147] *See supra* Part III.D.2 Table I, Panel B.

[148] *See supra* Part III.A discussing equity securities subject to requirements of Regulation SHO.

[149] This estimate is derived from broker-dealer FOCUS filings as of December 31, 2020.

[150] This estimate is derived from an analysis conducted by Commission staff of CAT data indicating that 1,218 broker-dealers would have been required to mark an order ''buy to cover'' in November 2021. The Commission further estimates that a month-long period is likely to capture all broker-dealers to which the marking requirement of Proposed Rule 205 would apply.

[151] Our estimate of 62.25 billion annual ''buy to cover'' orders was calculated based on a staff review of short sale trades, comprised of trades marked ''short'' and ''short exempt'' during the five years from 2016 through 2020. Based on a review of Rule 605 reports from the three largest market centers during August 2008, we have previously estimated a ratio of 14.4 orders to each completed trade. We gross up our 4.3 billion estimate of average annual short sale trades from 2016 to 2020 by 14.4, which yields 62.25 billion average annual short sale orders. A similar review of Rule 605 reports from large market centers has not been performed since the August 2008 period. The ratio of short sale orders to completed trades may have increased or decreased since that time.

[152] This figure was calculated as follows: 62.25 billion ''buy to cover'' orders divided by 1,218 broker-dealers anticipated to place orders requiring the ''buy to cover'' order mark.

[153] The upper end of this estimate—.5 seconds—is based on the same time estimate for marking sell orders ''long'' or ''short'' under Rule 200(g) of Regulation SHO. *See* Regulation SHO Adopting Release, *supra* note 4, at 48023. *See also,* Exchange Act Release No. 48709 (Oct. 28, 2003) 68 FR 62972, 63000 n. 232 (Nov. 6, 2003); Exchange Act Release No. 59748 (Apr. 10, 2009), 74 FR 18042, 18089 (Apr. 20, 2009) (providing the same estimate—.5 seconds—for marking sell orders ''short exempt'' under Rule 200(g) of Regulation SHO). The lower end of this estimate—.042 seconds—is based on a Commission estimate that computing speeds are twelve times faster today than they were in 2007. *See infra* note 312.

In addition to the burden and costs associated with the marking of individual ''buy to cover'' orders, the Commission believes that broker-dealers required to mark ''buy to cover'' will incur initial, one-time technology project costs to update their existing order marking systems. The Commission believes that the implementation cost of the ''buy to cover'' marking requirement will likely be similar to the implementation cost of the ''short exempt'' order marking requirements of Rule 200(g) of Regulation SHO.[154] The initial implementation cost of the ''short exempt'' order marking requirement was estimated to be approximately $115,000 to $145,000 per broker-dealer. Taking the average of that range and updating it for inflation results in an approximate one-time cost of $170,000 per broker-dealer,[155] and a total initial combined implementation cost of approximately $207,060,000 for all broker-dealers that are estimated to ''buy to cover.'' [156]

PRA Table 4—Estimated Broker-Dealer Costs Associated With Initial ''Buy to Cover'' Order Marking System Updates

	Broker-dealers that may ''buy to cover''	Estimated initial technology cost to update order marking systems	Total initial costs to all broker-dealers
''Buy to Cover'' Initial System Updates	1,218	$170,000	$207,060,000

In making its estimate of annual ''buy to cover'' orders, the Commission notes that its estimate may be over-inclusive of the total number of purchase orders that can be reasonably expected to be covered by Proposed Rule 205. As noted above, the estimate is based on the average annual orders marked ''short'' and ''short exempt'' over a five year period—2016 through 2020. Such data was used based on the assumption that, over the course of a year, for every short position created by a ''short'' or ''short exempt'' sale order, there will be an equal and opposite number of ''buy to cover'' purchase orders placed in order to cover, and ultimately close out, those short positions. However, the Commission recognizes that industry practices may differ in terms of how order marks are applied (*e.g.,* whether orders marked ''short'' are defaulted to in some instances where the seller may in fact be net long) and/or how short positions are created (*e.g.,* potentially with multiple, smaller orders over time) and covered (*e.g.,* potentially with fewer, larger orders). The Commission also requests comment on the 14.4 ratio of orders to trades used to calculate the total number of anticipated ''buy to cover'' orders. The Commission recognizes that the number of orders that result in a transaction may have materially changed since the August 2008 estimate based on a review of Rule 605 reports.[157] The Commission also requests comment on the estimated range of .042 to .5 seconds (.00001158 to .000139 hours) that it takes for a broker-dealer to properly mark a purchase order for an account that holds a gross short position in the security being purchased as ''buy to cover.'' The Commission also requests comment on the estimated cost of $170,000 per broker-dealer of initially adding the ''buy to cover'' mark to existing order marking systems, including whether having existing order marking systems, potentially having previously updated such systems to include a ''short exempt'' order mark, and significant advances in technology and automation may have reduced the estimated costs from those described in 2003 and 2004.[158] Thus, the Commission seeks specific comment as to whether the proposed burden estimates are appropriate or whether such estimates should be increased or reduced. Among the other factors of these estimates, the Commission invites comments on the estimated number of ''buy to cover'' orders anticipated to be placed by broker-dealers each year (62.25 billion), the estimated ratio of orders per trade (14.4:1), the time required to accurately mark a purchase order ''buy to cover'' (between .042 and .5 seconds), and the cost of updating existing order marking systems to accommodate the ''buy to cover'' order mark ($170,000). If those estimates or any other element of the estimated Proposed Rule 205 burdens should be increased or decreased, please address by how much and why.

D. Burdens and Costs Associated With the Proposal To Amend CAT

1. Summary of Collections of Information

The Proposal to Amend CAT would amend the CAT NMS Plan to require Participants to update their Compliance Rules to require reporting by Industry Members of the following information: (i) For the original receipt or origination of an order to buy an equity security, whether such buy order is for an equity security that is a ''buy to cover'' order as defined by Rule 205(a) of Regulation SHO (17 CFR 242.205(a)); and (ii) for the original receipt or origination of an order to sell an equity security, whether the order is a short sale effected by a market maker in connection with bona-fide market making activities in the security for which exception Rule 203(b)(2)(iii) of Regulation SHO is claimed.[159]

2. Proposed Use of Information

The Commission believes that requiring proposed reporting of certain short sale information to the CAT would provide valuable information for the Commission and other regulators in investigations and reconstruction of market events. Ready access to ''buy to cover'' information in the CAT would allow regulators to determine whether a purchase or sale of an equity security increases or decreases equity exposure of an Industry Member or Customer, and whether the buy covers a short position. The ability to determine whether an order adds to an existing position or covers an existing short position would

[154] *See* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11287 (Mar. 10, 2010), basing its cost estimates for the implementation of ''short exempt'' order marking on the estimates contained in Regulation SHO Adopting Release, *supra* note 4, at 48023, which based its cost estimates on input from industry sources.

[155] The adjustment for inflation was calculated using information in the Consumer Price Index, U.S. Department of Labor, Bureau of Labor Statistics for February 2010 and November 2021.

[156] This figure was calculated as follows: $170,000 implementation cost × 1,218 broker-dealers anticipated to mark ''buy to cover'' = $207,060,000 industry-wide implementation cost.

[157] *See supra* note 151.

[158] *See supra* note 154 and accompanying text.

[159] *See supra* Part VI; *see also* proposed CAT NMS Plan Sections 6.4(d)(ii)(D) and 6.4(d)(ii)(E).

be useful in detecting and investigating portfolio pumping, short selling abuses, short squeezes marking the close, potential manipulation, insider trading, or other rule violations. It would also assist Commission staff and regulatory staff analysis of the impact of ''buys to cover'' on equity prices and price volatility, and determine the impact of ''short squeezes.'' The Commission believes that requiring Industry Members to identify short sales for which they are claiming the bona fide market making exception would provide the Commission staff and other regulators an additional tool to determine whether such activity qualifies for the exception, or instead is indicative of, for example, proprietary trading instead of bona fide market making.

3. Respondents

a. National Securities Exchanges and National Securities Associations

The respondents to certain proposed collections of information for the Proposal to Amend CAT would be the 25 Plan Participants (the 24 national securities exchanges and one national securities association (FINRA)).[160]

b. Members of National Securities Exchanges and National Securities Associations

The respondents for certain information collection for the Proposal to Amend CAT are the Participants' broker-dealer members, that is, Industry Members. The Commission understands that there are currently 3,551 broker-dealers;[161] however, not all broker-dealers are expected to have new CAT reporting obligations under the Proposal to Amend CAT.[162] Based on an analysis of CAT data from November 2021, conducted by Commission staff, the Commission estimates that approximately 1,218 broker-dealers will be affected by the Proposal to Amend CAT, including 1,218 broker-dealers that would be required to report ''buy-to-cover'' information on buy orders for equity securities and 104 broker-dealers that would be required to report for the original receipt or origination of an order to sell an equity security whether the order is a short sale effected by a market maker in connection with bona-fide market making activities in the security for which the exception in Rule 203(b)(2)(iii) of Regulation SHO is claimed.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission's total burden estimates in this Paperwork Reduction Act section reflect the total burden on all Participants and Industry Members. The burden estimates per Participant or Industry Member are intended to reflect the average paperwork burden for each Participant or Industry Member, but some Participants or Industry Members may experience more burden than the Commission's estimates, while others may experience less. The burden figures set forth in this section are the based on a variety of sources, including Commission staff's experience with the development of the CAT and estimated burdens for other rulemakings. Because the CAT NMS Plan applies to and obligates the Participants and not the Plan Processor, the Commission believes it is appropriate to estimate the Participants' external cost burden based on the estimated Plan Processor staff hours required to comply with the proposed obligations.[163] Put another way, pursuant to the proposed amendments to the CAT NMS Plan the Participants will be obligated to make changes to the CAT, but the CAT is managed by the Plan Processor pursuant to contractual agreement, and so the Participants will be required to engage the Plan Processor to make any required changes.

a. Participant Burdens

The Proposal to Amend CAT would require the Participants to engage the Plan Processor to modify the Central Repository to accept and process the new short sale data elements on order receipt and origination reports. The Commission estimates that the Participants would incur an initial, one-time burden of 130 hours, or 5 hours per Participant, of staff time required to supervise and implement the changes necessary for the Plan Processor to accept and process the new data elements, and an external cost of $101,520, or a per Participant expense of approximately $4,060.80 to compensate the Plan Processor for staff time required to make the initial necessary programming and systems changes to accept and process the new data elements, based on a preliminary estimate that it would take 300 hours of Plan Processor staff time to implement these changes.[164]

The Commission believes that other Paperwork Reduction Act burdens that would apply to the Participants, including ongoing burdens and external expenses for the Plan Processor's acceptance and processing of the new data elements, are already accounted for in the existing Paperwork Reduction Act estimate that applies for Rule 613 and the CAT NMS Plan Approval Order, submitted under OMB number 3235–0671.[165] The Commission believes that the prior Paperwork Reduction Act analysis incorporates any other potential Paperwork Reduction Act burdens for the Participants because the existing Paperwork Reduction Act analysis accounts for initial and ongoing costs for, among other things, operating and maintaining the Central Repository, including the cost of systems and connectivity upgrades or changes necessary to receive and consolidate the reported order and execution information from Participants and their members, the cost to store data and make it available to regulators, the cost of monitoring the required validation parameters, and management of the Central Repository.[166] In addition, the Commission anticipates that each exchange and national securities association would file one Form 19b–4 filing to implement updated Compliance Rules. While such filings may impose certain costs on the exchanges, those burdens are already accounted for in the comprehensive

[160] The Participants are: BOX Options Exchange LLC; Cboe BZX Exchange, Inc.; Cboe BYX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX, Inc.; Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange Inc.; Long-Term Stock Exchange, Inc.; MEMX, LLC; Miami International Securities Exchange LLC; MIAX PEARL, LLC; MIAX Emerald, LLC; NASDAQ BX, Inc.; NASDAQ GEMX, LLC; NASDAQ ISE, LLC; NASDAQ MRX, LLC; NASDAQ PHLX LLC; The NASDAQ Stock Market LLC; New York Stock Exchange LLC; NYSE MKT LLC; and NYSE Arca, Inc., NYSE Chicago Stock Exchange, Inc., NYSE National, Inc.

[161] *See supra* note 149.

[162] *See also supra* Part VI.B.2.

[163] The Commission derives estimated costs associated with Plan Processor and Industry Member staff time based on per hour figures from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation based on Bureau of Labor Statistics data on CPI–U between January 2013 and January 2020 (a factor of 1.12). For example, the 2020 inflation-adjusted effective hourly wage rate for attorneys is estimated at $426 ($380 × 1.12).

[164] The estimated 300 hours of Plan Processor staff time include 200 hours by a Senior Programmer, 40 hours by a Senior Database Administrator, 40 hours for a Senior Business Analyst and 20 hours for an Attorney. The Commission estimates that the initial, one-time external expense for Participants will be $101,520 = (Senior Programmer for 200 hours at $339 an hour = $67,800) + (Senior Database Administrator for 40 hours at $349 an hour = $13,960) + (Senior Business Analyst for 40 hours at $281 an hour = $11,240) + (Attorney for 20 hours at $426 an hour = $8,520).

[165] *See* CAT NMS Plan Approval Order, 81 FR at 84911–43. *See also* OMB Control No. 3235–0671, 85 FR 37721 (June 23, 2020) (notice of submission of request for approval of extension).

[166] *See* CAT NMS Plan Approval Order, 81 FR at 84918.

Paperwork Reduction Act Information Collection submission for Form 19b–4.[167] The Commission does not expect the baseline number of 19b–4 filings to increase as a result of the Proposal to Amend CAT, nor does it believe that the incremental costs exceed those costs used to arrive at the average costs and/or burdens reflected in the Form 19b–4 PRA submission.

b. Broker-Dealer Burdens

The Commission believes that certain Industry Members will have initial, one-time burdens and costs relating to the Proposal to Amend CAT, to update systems and processes as necessary to capture and report the proposed data elements to CAT. The Commission has estimated these initial burdens and costs below.

The Commission also believes that the Proposal to Amend CAT would impose an ongoing annual burden relating to, among other things, personnel time to monitor each broker-dealer's reporting of the required data and the maintenance of the systems to report the required data, and implementing changes to trading systems that might result in additional reports to the Central Repository. However, the Commission believes that the ongoing burden imposed by the Proposal to Amend CAT related to reporting to the CAT is already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under OMB number 3235–0671.[168] Specifically, the CAT NMS Plan Approval Order takes into account requirements on broker-dealer members to comply with the CAT NMS Plan, including the requirement to maintain the systems necessary to collect and transmit information to the Central Repository,[169] provides aggregate burden hour and external cost estimates for the broker-dealer data collection and reporting requirement of Rule 613, and did not quantify the burden hours or external cost estimates for each individual component comprising the broker-dealer's data collection and reporting responsibility.[170] The Proposal to Amend CAT would not require any Industry Member to submit new reports to the CAT, but to add limited additional information to existing reports in certain circumstances for certain Industry Members. The Commission does not believe that this would alter the estimates of ongoing burden and external costs in the existing Paperwork Reduction Act Analysis and the ongoing burden associated with these new collection requirements are accounted for in the existing Paperwork Reduction Act Analysis.

Buy to Cover Information on Orders

With regard to the obligation to report ''buy to cover'' information on orders to the CAT, the Commission believes that it is appropriate to divide the 1,218 Industry Members that would be required to report buy to cover information to the CAT for the original receipt or origination of orders into two categories: (i) Industry Members that report directly to the CAT (''insourcing Industry Members''); and (ii) Industry Members that use third-party reporting agents such as service bureaus for CAT reporting (''outsourcing Industry Members''). For purposes of this Paperwork Reduction Act analysis, the Commission estimates that of the 1,218 Industry Members that would be required to report buy to cover information to the CAT for the original receipt or origination of orders, 126 would be insourcing Industry Members, and 1,092 would be outsourcing Industry Members. This is based on the CAT NMS Approval Order, which based on an analysis of specific data provided by FINRA on how firms report OATS data estimated that there were 126 large OATS[171] reporting broker-dealers, with all other broker-dealers either not reporting to CAT at the time or reporting to OATS through service bureaus.[172] The Commission believes it is reasonable to estimate for purposes of this Paperwork Reduction Act analysis that the same number of broker-dealers that reported directly to OATS report directly to CAT, and that it unlikely that previously outsourcing broker-dealers and broker-dealers without an obligation to report to OATS developed the infrastructure necessary to report to the CAT.

The Commission estimates that the 126 insourcing Industry Members will incur an initial, aggregate, one-time burden of 32,760 hours, or that each of these insourcing Industry Members would incur an initial, average one-time burden of 260 hours, and that these 126 insourcing Industry Members will incur an initial, aggregate, one-time external expense of approximately $1,890,000 for software and hardware to facilitate reporting of the new data elements to CAT, or that each insourcing Industry Member would incur an initial, average one-time external expense of approximately $15,000 for hardware and software to facilitate reporting of the new data elements to CAT.[173]

The Commission estimates that the 1,092 outsourcing Industry Members will incur an initial, aggregate, one-time burden of 10,920 hours, or that each of these outsourcing Industry Members would incur an initial, one-time burden of 10 hours on average, and that together these 1,092 outsourcing Industry Members will incur an initial, aggregate, one-time external expense of approximately $1,092,000 for software and hardware to facilitate reporting of the new data elements to CAT and for external expenses relating to fees paid to CAT reporting agents to update their systems or coding as necessary, or that each outsourcing Industry Member would incur an initial, average one-time external expense of approximately $1,000.[174]

[167] *See* OMB Control No. 3235–0045 (August 19, 2016), 81 FR 57946 (August 24, 2016) (Request to OMB for Extension of Rule 19b–4 and Form 19b–4 PRA).

[168] *See* CAT NMS Plan Approval Order, 81 FR at 84911–43.

[169] *See, e.g.,* CAT NMS Plan Approval Order, 81 FR at 84930.

[170] *See* CAT NMS Plan Approval Order, 81 FR at 84930.

[171] OATS was FINRA's Order Audit Trail System, which existed prior to the creation of the CAT and was an order audit trail system maintained by FINRA, was retired on September 1, 2021 because FINRA determined that the accuracy and reliability of the CAT met certain standards and thus OATS was duplicative in light of the implementation of CAT. *See* Exchange Act Notice No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021).

[172] *See* CAT NMS Plan Approval Order, 81 FR at 84860.

[173] The Commission is basing this figure on the estimated internal burden for a broker-dealer that handles orders subject to customer specific disclosures required by Rule 606(b)(3) to both update its data capture systems in-house and format the report required by Rule 606. *See* Exchange Act Release No. 84528 (November 2, 2018), 83 FR 58338, 58383 (November 19, 2018) (''Rule 606 Adopting Release''). The Commission believes that this is a reasonable proxy for a preliminary estimation for the burdens and costs associated with updating data capture systems for reporting purposes here because in both rulemakings broker-dealers were required to update in-house data reported for pre-existing reporting obligations, and, as discussed above, the Paperwork Reduction Act analysis for Rule 613 and the CAT NMS Plan did not attempt to quantify the burden hours or external cost estimates for each individual component comprising the broker-dealer's data collection and reporting responsibility. *See supra* note 169.

[174] The Commission believes that the preliminary estimated burden and external costs for outsourcing Industry Members is reasonable because the burden on individual Industry Members should be significantly lower than insourcing Industry Members because of the difference in how these firms report to the CAT. Outsourcing Industry Members will not be required to change internal CAT reporting systems, but instead would have to be responsible for making any updates necessary for CAT reporting agents to report this information to the CAT. The outsourcing Industry Members will have external costs associated with paying CAT reporting agents for any additional fees relating to the change, but because CAT reporting agents can report on behalf of numerous outsourcing Industry Members at the same time, the costs of any updates to their systems can be distributed amongst outsourcing Industry Members.

As discussed above, the Commission does not believe that these CAT Reporters would have an ongoing PRA burden or external costs related to the reporting of the new information to CAT because the ongoing burden and external costs are already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under OMB number 3235–0671.[175]

Bona Fide Market Making Exception Information

The Commission believes that this aspect of the Proposal to Amend CAT will only impose additional burdens on Industry Members that trade equity securities and rely upon or plan to rely upon the bona fide market making exception. Based on an analysis of data reported to the CAT in November 2021, and specifically the identification of all unique CAT Reporters that were identified as equity market makers (including different classes of market makers such as ''designated'' or ''lead'' market makers, and secondary liquidity providers), the Commission believes that approximately 104 CAT Reporters will be subject to the new reporting obligation. The Commission believes that some broker-dealers that rely upon this exception may retain records regarding their eligibility for this exception for specific orders or for orders originated by specific desks or units of their business, and thus for some broker-dealers this information could be more easily reportable than information not currently available to Industry Members, such as the ''buy to cover'' identification of equity buy orders.

With regard to the obligation to report regarding bona fide market making exception information to the CAT, the Commission believes that it is appropriate to divide the 104 Industry Members that would be required to report this information into two categories: (i) Industry Members that report directly to the CAT; and (ii) Industry Members that use third-party reporting agents for CAT reporting. For purposes of this Paperwork Reduction Act analysis, the Commission estimates that of the 104 Industry Members that would be required to this information, 60 Industry Members would be reporting this information directly to the CAT, and 44 Industry Members would be reporting this information through third-party reporting agents. The Commission believes this is a reasonable estimation because it believes that the majority of Industry Members that are identified as market makers in the CAT are large enough to have developed their own systems and technology to report directly to the CAT.

The Commission estimates that the 60 insourcing Industry Members that report directly to the CAT will incur an initial, aggregate, one-time burden of 15,600 hours, or that each of these CAT Reporters would incur an initial, average one-time burden of 260 hours, and that each of these 60 insourcing Industry Members will incur an initial, aggregate, one-time external expense of approximately $900,000 for software and hardware to facilitate reporting of the new data elements to CAT, or that each insourcing Industry Member would incur an initial, average one-time external expense of approximately $15,000.[176]

The Commission estimates that the 44 outsourcing Industry Members that use third-party reporting agents to report to the CAT will incur an initial, aggregate, one-time burden of 440 hours, or that each of these outsourcing Industry Members would incur an initial, one-time burden of 10 hours on average, and that these 44 outsourcing Industry Members will incur an initial, aggregate, one-time external expense of approximately $44,000 for software and hardware to facilitate reporting of the new data elements to CAT, or that each outsourcing Industry Member would incur an initial, average one-time external expense of approximately $1,000.[177]

As discussed above, the Commission believes that the ongoing burden associated with reporting to the CAT is already accounted for in the existing information collections burdens associated with Rule 613 and the CAT NMS Plan Approval Order submitted under OMB number 3235–0671.[178] Because this information is already collected and maintained by market makers that engage in equity trading and claim the exception pursuant to Rule 17a–3 of the Exchange Act, the Commission believes there is no new ongoing burden associated with collecting or recording the information necessary to effectuate CAT reporting of this new element.

c. Summary of Initial One-Time Burdens Relating to Proposal To Amend CAT

Name of information collection	Type of burden	Number of entities impacted	Initial one-time hourly burden	Aggregate one-time hourly burden	Initial one-time cost	Aggregate one-time cost
CAT: Central Repository—Short Sale Data.	Recordkeeping	25	5	130	$4,060.80	$101,520
CAT: Reporting of Buy to cover Information for Orders—Insourcers.	Third Party Disclosure.	126	260	32,760	15,000	1,890,000
CAT: Reporting of Buy to cover Information for Orders—Outsourcers.	Third Party Disclosure.	1,092	10	10,920	1,000	1,092,000
CAT: Reporting of Bona Fide Market Making Exception—Insourcers.	Third Party Disclosure.	60	260	15,600	15,000	900,000
CAT: Reporting of Bona Fide Market Making Exception—Outsourcers.	Third Party Disclosure.	44	10	440	1,000	44,000

[175] *See supra* note 165.

[176] The Commission is basing this figure on the estimated burden and external costs for a broker-dealer that handles orders subject to customer specific disclosures required by Rule 606(b)(3) to update their systems to capture the data and produce a report to comply with Rule 606. *See* Rule 606 Adopting Release, 83 FR at 58383. The Commission believes that this is a reasonable proxy for a preliminary estimation for the burdens and costs associated with updating data capture systems for reporting purposes here because in both rulemakings broker-dealers were required to update in-house data reported for pre-existing reporting obligations.

[177] The Commission believes that the preliminary estimated burden and external costs for outsourcing Industry Members is reasonable because the burden on individual Industry Members should be significantly lower than insourcing Industry Members because of the difference in how these firms report to the CAT. Outsourcing Industry Members will not be required to change internal CAT reporting systems, but instead would have to be responsible for making any updates necessary for CAT reporting agents to report this information to the CAT. The outsourcing Industry Members will have external costs associated with paying CAT reporting agents for any additional fees relating to the change, but because CAT reporting agents can report on behalf of numerous outsourcing Industry Members at the same time, the costs of any updates to their systems can be distributed amongst outsourcing Industry Members.

[178] *See supra* note 165.

E. Collection of Information Is Mandatory

The proposed information collections are required under Proposed Rule 13f–2 and Proposed Form SHO for Managers that meet one of the Reporting Thresholds, Proposed Rule 205 for broker-dealers that effect purchase orders for accounts with open short positions in the equity securities being purchased, and the Proposal to Amend CAT for Plan Participants to collect and process new CAT reportable information and for CAT Industry Members that engage in certain short sale activity.

F. Confidentiality

As discussed above, Proposed Rule 13f–2 would require certain Managers to file monthly in EDGAR, on Proposed Form SHO, certain short sale volume data and short interest position data. However, the Commission is proposing that the information reported by Managers on Proposed Form SHO be aggregated prior to publication so as to protect the identity of reporting Managers.

The Commission would not typically receive confidential information as a result of Proposed Rule 205. To the extent that the Commission receives—through its examination and oversight program, through an investigation, or by some other means—records or disclosures from a broker-dealer that relate to or arise from Proposed Rule 205 that are not publicly available, such information would be kept confidential, subject to the provisions of applicable law.

With respect to the Proposal to Amend CAT, Rule 613 and the CAT NMS Plan requires that the information to be collected and electronically provided to the Central Repository would only be available to the national securities exchanges, national securities association, and the Commission. Further, the CAT NMS Plan includes policies and procedures designed to ensure the security and confidentiality of all information submitted to the Central Repository, and to ensure that all SROs and their employees, as well as all employees of the Central Repository, shall use appropriate safeguards to ensure the confidentiality of such data. The Commission would receive confidential information pursuant to this collection of information, and such information will be kept confidential, subject to the provisions of applicable law.

G. Request for Comments

The Commission requests comment on whether the estimates for burden hours and costs are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

- *Q20:* Has the Commission accurately estimated the paperwork burdens and costs to Managers associated with fulfilling the reporting requirements of Proposed Rule 13f–2?
- *Q21:* Has the Commission accurately estimated the number of Managers (1,000) anticipated to be required to file Proposed Form SHO each month? If the estimate should be increased or decreased, please address by how much and why.
- *Q22:* Has the Commission accurately estimated the amount of time (325 hours) needed for Managers to complete initial technology projects to facilitate fulfillment of the reporting requirements of Proposed Rule 13f–2? If the estimate should be increased or decreased, please address by how much and why.
- *Q23:* Has the Commission accurately estimated the number of Managers each month (1,000) that will use a structured XML data language methodology, as opposed to the web-fillable Proposed Form SHO directly on EDGAR, to file Proposed Form SHO? Has the Commission accurately estimated the number for Managers each month (35) that will use a structured XML data language methodology to file an amended Proposed Form SHO?
- *Q24:* Has the Commission accurately estimated the additional paperwork burden (2 hours of work by a programmer) for Managers to file a Proposed Form SHO via the structured XML data language methodology? Is the additional burden (2 hours of work by a programmer) more accurately categorized as an ongoing per filing burden or an initial, one-time technological systems update burden?
- *Q25:* Has the Commission accurately estimated that approximately 3.5% of Proposed Form SHO filers would also file an amended Proposed Form SHO, resulting in additional burdens and costs for an estimated 35 Managers each month?
- *Q26:* Has the Commission accurately estimated the paperwork burdens and costs to broker-dealers associated with fulfilling the order marking requirements of Proposed Rule 205? Has the Commission accurately estimated the number of broker-dealers (1,218) that will be required to update their order marking systems to incorporate the ''buy to cover'' order mark?
- *Q27:* Has the Commission accurately estimated the total number of orders marked ''buy to cover'' by broker-dealers each year (62.25 billion)? If the estimate should be increased or decreased, please address by how much and why.
- *Q28:* Is the Commission's estimation that, over the course of a year, for every short position created by a ''short'' or ''short exempt'' sale order, there will be an equal and opposite number of ''buy to cover'' purchase orders placed in order to cover, and ultimately close out, those short positions, an accurate projection of how frequently ''buy to cover'' order marks will be used? If there is a more accurate means of estimating the volume of anticipated annual ''buy to cover'' order marks, please describe its structure and why it is more accurate.
- *Q29:* Has the Commission accurately estimated the ratio of orders to trades (14.4:1) used to calculate the total number of anticipated ''buy to cover'' orders? If the estimate should be increased or decreased, please address by how much and why.
- *Q30:* Has the Commission accurately estimated the time it takes (between .042 and .5 seconds) for a broker-dealer to properly mark a purchase order as ''buy to cover'' for an account that holds a gross short position in the security being purchased? If the estimate should be increased or decreased, or the range narrowed, please address by how much and why.
- *Q31:* Has the Commission accurately estimated the cost to broker-dealers ($170,000) to update their order marking systems, or is such a cost likely to have decreased for reasons including technological advances? If the estimate should be increased or decreased, please address by how much and why.
- *Q32:* Has the Commission accurately captured the market participants who would be subject to

the burdens and costs under the Proposal to Amend CAT?

- *Q33:* Has the Commission accurately estimated the number of Industry Members anticipated to be required to report new information to the CAT under the Proposal to Amend CAT?
- *Q34:* Has the Commission accurately estimated the paperwork burdens and costs to market participants associated with the Proposal to Amend CAT?

Persons wishing to submit comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–08–22. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–08–22, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

VIII. Economic Analysis

A. Introduction

The Commission is proposing new reporting requirements in connection with short sales. The Commission is mindful of the economic effects that may result from the proposed requirements, including the benefits, costs, and the effects on efficiency, competition, and capital formation.[179] The Commission believes that, if adopted, Proposed Rule 13f–2 and Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT would result in improved regulatory oversight, as the data that would become available to regulators would close informational gaps in the currently available data, which would in turn benefit market participants and help foster fair and orderly markets. More specifically, the Proposals would increase transparency and improve regulators' examination of market behavior and recreation of significant market events. These improvements may, in turn, discourage abusive short selling.[180] Proposed Rule 13f–2 would also increase transparency for market participants about short selling, which could help refine market participants' understanding of the level of negative sentiment and the actions of short sellers.

The Proposals may also lead to tradeoffs in market quality. A reduction in abusive short selling and improved regulatory oversight may have a positive impact on market quality. Furthermore, the Proposals would provide market participants improved transparency into short selling which could also improve price efficiency. However, Proposed Rule 13f–2 and Proposed Form SHO could chill short selling by increasing the costs and risks of implementing large short positions, which could reduce the positive effects of short selling on market quality. Furthermore, public disclosure of information resulting from Proposed Rule 13f–2 and Proposed Form SHO could facilitate short squeezes, which could reduce market quality for all.[181]

In addition to the indirect costs to market quality, Proposed Rule 13f–2, Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT could impose significant compliance costs on market participants. The proposal to require Managers to report large positions and activity would likely impose significant initial and ongoing costs on Managers. Proposed Rule 205 and the Proposal to Amend CAT could impose large initial costs and ongoing compliance costs on broker-dealers.

The Commission has considered the economic effects of the Proposals and wherever possible, the Commission has quantified the likely economic effects of the Proposals. The Commission is providing both a qualitative assessment and quantified estimates of the potential economic effects of the Proposals where feasible. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the Proposals. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain, data that may inform the Commission on certain economic effects, the Commission is unable to quantify certain economic effects. Further, even in cases where the Commission has some data, quantification is not practicable due to the number and type of assumptions necessary to quantify certain economic effects, which render any such quantification unreliable. Our inability to quantify certain costs, benefits, and effects does not imply that the Commission believes such costs, benefits, or effects are less significant. The Commission requests that commenters provide relevant data and information to assist the Commission in quantifying the economic consequences of Proposed Rule 13f–2, Proposed Form SHO, Proposed Rule 205, and Proposal to Amend CAT.

B. Economic Justification

The Commission is proposing the required Manager reporting and disclosures, in part, to implement the specific statutory mandate of Section 929X of the Dodd-Frank Act. Accordingly, many of the costs and benefits of Proposed Rule 13f–2 and Proposed Form SHO stem from the Commission's response to the statutory mandate. In addition, the Commission is exercising discretion in its design and implementation of Proposed Rule 13f–2 and Proposed Form SHO, and recognizes that this discretion has economic effects. Specifically, the Commission is using this discretion to ensure that the proposed disclosures are additive to currently available data and would be useful to both market participants and regulators, with a focus on addressing data limitations exposed by the market volatility in January 2021. Finally, Proposed Rule 205 and Proposal to Amend CAT address such data limitations outside of the context of the statutory mandate of Section 929X.

CAT data, as well as other currently available data, can be used by regulators for surveillance, examinations, investigations, and other enforcement

[179] Exchange Act Section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

[180] *See infra* Part VIII.D.1 (for additional discussion on potential abusive short selling practices).

[181] *See infra* Part VIII.D.1. The Commission expects that for many securities, a limited number of Manager positions may surpass the reporting requirement thresholds. Given the eventual public release of the aggregate position sizes, there is a risk that other market participants will be able to potentially identify the Managers with large short positions and orchestrate short squeeze efforts against them (should they seem vulnerable against a short squeeze). Nevertheless, the Commission maintains the ability of identifying such behavior using CAT data, which could mitigate initiation of such behavior.

functions, for the analysis and reconstruction of market events, and for more general market analysis and research. At times, these activities would benefit from information on customer or market participant positions and how those positions change over time. CAT was not designed to track such positions, and Staff experience in reconstructing the events of January 2021 provided insights into the challenges of using existing CAT data for this purpose. Other existing data sources, including public data sources, are also limited for these purposes and also for informing members of the public and market participants. Specifically, current data (1) fails to distinguish economic short exposure from hedged positions or intraday trading, (2) fails to distinguish the type of trader short selling or identify individual short positions, even for regulatory use, and (3) fails to capture the various ways that short positions can change and the various ways to acquire short exposure. The Proposals are designed to address these data limitations.

Existing data sources fail to accurately represent the economic short exposures of Managers due to several limitations. While existing data report aggregate short positions on a bi-monthly basis, they do not reflect the timing with which short positions expand or shrink in the two-week period between the two reporting dates.[182] Some data sources report daily short sale volume [183] without distinguishing short sale transactions that affect economic short exposures from those meant for purposes such as liquidity provision or hedging of long positions. As such, the existing short volume data may not be combined with the bi-monthly short interest data to construct aggregate daily short positions. Existing securities lending data that may be considered indirect measures of short interest are expensive, incomprehensive, and biased—in particular, security loans may serve purposes other than covering short positions, *e.g.,* cover failure to deliver or borrowing cash by the lender. No existing data identify short positions by individual traders. Even though some regulatory data identify short transactions of individual traders, they may not be utilized to reconstruct short positions because economic short exposure may change in the absence of any short sale transactions.

These data limitations inhibit regulators from performing functions such as market surveillance and market reconstruction. For example, the Commission would not have regular access to information about Managers who hold large short positions even if those positions are held for a long period of time. If the positions are sufficiently large and prices move against the positions, the Commission cannot currently efficiently assess the risk that the positions impose on the market more broadly. Additionally, with existing data the Commission may have difficulty reconstructing significant market events—inhibiting the Commission in quickly understanding market events and providing efficient market oversight.

The data limitations also prevent the market from more fulsome interpretations of existing short selling information. For example, existing data can show a short interest level, but little is known about how much of that short interest level is directional or hedged and the extent to which short positions change between short interest disclosures.

C. Baseline

1. Institutional Investment Managers

The potential universe of persons who meet the definition of Manager is expansive. Exchange Act Section 13(f)(6)(A) defines the term ''institutional investment manager'' as ''includ[ing] any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.'' [184] Exchange Act Section 3(a)(9) states that ''[t]he term 'person' means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.'' '' 'Company' means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such.'' [185] As a result, Managers exercising discretion over the accounts of others could include but are not limited to investment advisors exercising investment discretion over client assets, including investment company assets such as mutual funds, ETFs, and closed-end funds; banks and bank trust corporations offering investment management services; pension fund managers; corporations, including broker-dealers and insurance companies, managing corporate or employee investment assets; and individuals exercising investment discretion over the accounts of others. Also as a result of the definition of Manager, the set of Managers excludes natural persons buying and selling securities only for their own account but does include natural persons exercising discretion over the account of another person.[186]

Notwithstanding the broad statutory definition of Manager, it is the Commission's understanding that only a fraction of Managers of are believed to engage in short selling and fewer still engage in any significant short selling. Market makers, for example, engage in short selling but, with the exception of option market makers, generally do not hold large positions overnight. We are also aware, for example, that advisers to both hedge funds and registered investment companies engage in short selling to varying degrees. However, with the exception of hedge funds, institutional investors are viewed as ''largely absent'' from the short selling portion of the financial markets.[187]

---

[182] FINRA requires all members to report settled short positions in equities of all customer and proprietary accounts twice per month. According to the schedule it has adopted, FINRA publishes the short sale data about a week after each reporting due date. *See, e.g.,* Short Interest Reporting, *available at https://www.finra.org/filing-reporting/regulatory-filing-systems/short-interest.*

[183] FINRA reports daily off-exchange short sale volume data that aggregate, for each exchange-listed security, short sale transactions reported to a FINRA TRF or ADF. *See Short Sale Volume Data,* FINRA, *available at https://www.finra.org/finra-data/browse-catalog/short-sale-volume-data.* Registered exchanges also report daily short sale volume aggregated at the security level, often charging a fee. *See, e.g., TAQ Group Short Sales & Short Volume,* New York Stock Exchange, *available at https://www.nyse.com/market-data/historical/taq-nyse-group-short-sales.*

[184] *See also* Exchange Act Section 3(a)(35) defining when a person exercises ''investment discretion'' with respect to an account.

[185] *See* Section 2(a)(8) of the Investment Company Act. The term ''company'' in the Exchange Act ''ha[s] the same meaning[ ] as in the Investment Company Act of 1940.'' Exchange Act Section 3(a)(19).

[186] To the extent that a natural person exercising discretion over the account of another person has a short position exceeding the proposed thresholds, that natural person would be subject to the costs associated with Proposed Rule 13f–2 and the Proposed Form SHO. We expect such a natural person would likely use the fillable web form provided by EDGAR to input Proposed Form SHO disclosures. The Commission believes that few Managers that are natural persons would be likely to have short positions large enough to exceed the threshold. *See infra* Section VIII.D.7 for more information on Managers' costs.

[187] Peter Molk and Frank Partnoy, *Institutional Investors as Short Sellers?,* 99 B.U. L. Rev. 837, 839 (2019), *available at https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1980&context=facultypub.* Molk and Partnoy's paper ''identif[ies] the regulatory and other barriers that keep key categories of institutions[, specifically, mutual funds, insurance companies, banks, sovereign

Using actual investment strategies employed by registered investment companies [188] as a proxy for the number of Managers in the public fund markets engaged in short selling, the number of such Managers is likely to be relatively small. A Division of Economic and Risk Analysis White Paper survey of all mutual fund Form N–SAR filings in 2014 found that ''[w]hile 64% of all funds were allowed to engage in short selling, only 5% of all funds actually did so.'' [189] As of September 2021, there were 7,043 registered investment companies with total equity positions valued at approximately $17 trillion. Of those, 152 funds had short positions with a total short position value of approximately $17.5 billion. Of the funds with short positions of approximately $17.5 billion, only 37 funds held positions equal to or greater than $10 million.[190] Additionally, according to an analysis of publicly available Form PF data, a substantial minority of single-strategy hedge funds employ strategies involving short selling.[191]

While information about Managers' investments other than from funds managed by investment advisers is limited, the Commission understands that such other Managers, other than options market makers due to their routine use of hedging transactions, do not frequently establish short positions that would be large enough to be subject to the proposed rule's reporting requirement.[192] The Commission believes one possible proxy for the number of Managers that could potentially have a reporting obligation is a fraction of the number of Managers reporting positions on Form 13F because such persons by definition manage accounts holding Section 13(f) securities having an aggregate fair market value of at least $100 million, making such Managers more likely to have the resources to engage in short selling over the proposed rule's thresholds. As of March 31, 2021, 7,550 Managers with investment discretion over approximately $39.79 trillion reported holdings on Form 13F in Section 13(f) securities.[193] The Commission also believes that registered investment advisers, particularly those managing hedge funds, are the primary Managers likely to be affected by the Proposed Rule. Though the Commission lacks data to quantify the number affected parties, the Commission estimates that the total number of Managers with reporting obligations will be between 346 and 1,000.[194]

2. Short Selling

Short selling is a widely used market practice, which allows investors to profit if an asset declines in value or to hedge risks. Market participants can build an economic short positions using traditional means (*i.e.,* borrowing shares and selling them into the market to buy back later) or they can gain short exposure using derivatives. This section provides an overview of the current state of obtaining short exposure to equities and the different means of short selling—*i.e.,* traditional means and using derivatives. This information is based on the current state of research using existing data.

i. Short Selling Equities

A short sale is the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[195] In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of an economic long position in the same security or in a related security. To short sell a stock, the short seller borrows shares of a stock from a lender—typically a long-term investor such as a mutual fund or pension fund—and sells those shares into the market. Later, the short seller purchases the same number of shares and returns them to the lender. The profit on the transaction for the short seller is the difference between the price at which the shares were initially sold and the price at which the investor re-purchased the shares—less any fees such as securities lending fees. If the price of the stock goes down then this difference will be positive and the investor will make money.

wealth funds, endowments, and foundations,] from acquiring significant short positions.'' *Id.* at 843.

[188] As of July 2021, there were 10,223 mutual funds (excluding money market funds) with approximately $18,588 billion in total net assets, 2,320 ETFs organized as an open-end fund or as a share-class of an open-end fund with approximately $6,447 billion in total net assets, 736 registered closed-end funds with approximately $314 billion in total net assets, 722 unit investment trusts with approximately $2,456 billion in total net assets, and 13 variable annuity separate accounts registered as management investment companies on Form N–3 with $218 billion in total net assets. Estimates of the number of registered investment companies and their total net assets are based on an analysis of Form N–CEN filings as of July 31, 2021. For open-end management funds, closed-end funds, and management company separate accounts, total net assets equals the sum of monthly average net assets across all funds in the sample during the reporting period. *See* Item C.19.a (Form N–CEN). For UITs, we use the total assets as of the end of the reporting period, and for UITs with missing total assets information, we use the aggregated contract value for the reporting period instead. *See* Item F.11 and F.14.c in Form N–CEN.

[189] Daniel Deli *et al.,* Use Of Derivatives By Registered Investment Companies at 8, *DERA White Paper* (2015), *available at https://www.sec.gov/files/derivatives12-2015.pdf.*

[190] This is based on an analysis of data provided by registered investment companies to the Commission on Form N–PORT.

[191] As of 2021 Q2, there are 1,124 hedge funds out of 6,083 Single-Strategy hedge funds (excluding fund-of-funds hedge funds) that employ short selling in an Equity Long/Short strategy (1,062), Equity Short-Biased strategy (18), or Fixed Income Convertible Arbitrage strategy (44). Assets under management (AUM) in these types of hedge funds total approximately $1.165 trillion. 2021 Q2 Private Fund Statistics, Division of Investment Management Analytics Office, *available at https://www.sec.gov/divisions/investment/private-funds-statistics.shtml.* Data includes both U.S. and non-U.S. domicile hedge funds managed by SEC-registered investment advisers with at least $150 million in private fund assets under management. The data does not include hedge funds that were classified as multi-strategy on Form PF. These hedge funds could employ short selling as part of their multi-strategy. Data for non-U.S. domicile hedge funds with an equity short-bias strategy is not publicly available for 2021 Q2. In this case the last publicly available values were used (7 funds with a total AUM of $1 billion) from 2019 Q3. As of the end of 2021, hedge fund assets totaled approximately $4 trillion. Global Hedge Fund Industry Assets Top $4 Trillion for the First Time, Reuters (Jan. 20, 2022), *available at https://www.reuters.com/business/finance/global-hedge-fund-industry-assets-top-4-trillion-first-time-2022-01-20/.*

[192] For example, according to Molk and Partnoy ''insurance companies generally are not active short sellers. Short selling by insurance companies is used almost exclusively to hedge positions, and generally is not used with respect to equity positions at all.'' *Supra* note 187 at 850. *See also* Molk and Partnoy discussion about banks and trusts. ''Trust administrators . . . have a history of adopting conservative investment strategies. Although shorting can be used to reduce risk when matched with similar long positions, using short selling as an income generation tool is not consistent with the overall conservative investment tradition.'' *Id.* at 854.

[193] *See* Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, Exchange Act Rel. No. 93169, (Oct. 15, 2021) *available at https://www.govinfo.gov/content/pkg/FR-2021-10-15/pdf/2021-21549.pdf.*

[194] *See supra* section VII.B.2. for more information on the estimates of how many managers would have reporting obligations.

[195] *See* Rule 200(a) of Regulation SHO, 17 CFR 242.200(a). *See also* Regulation SHO Adopting Release, *supra* note 4.

In addition to short selling based on negative sentiment, market participants also short sell to hedge existing positions. Hedging is a particularly potent motive to short sell a stock for options market makers who can hedge the risk of writing a call option by short selling the underlying stock in the stock market. Other investors use short selling to hedge out an unwanted component of a stock's return. For example, an investor who wants to buy a particular stock to trade on stock specific information but does not want to expose itself to industry risk can hedge industry risk by short selling an industry index ETF while purchasing the underlying security. Market makers also use short selling extensively to maintain two sided quotes in the temporary absence of inventory. Lastly, traders may use short selling as part of algorithmic trading strategies attempting to detect temporary pricing anomalies. While short selling to trade on information or to hedge generally results in short positions that are held for some time, market makers and algorithmic technical traders generally close their positions by the end of the day and thus their short positions generally do not show up in existing measures of short interest.[196]

Short selling generally entails more risk than holding a long position. At worst, a buyer of a long position can lose its entire investment. This is not true for a short seller. If the stock price increases from the short sale price, the investor loses money and since prices could potentially rise indefinitely, the short seller could lose more than the value of its original investment. Additionally, margin requirements for short selling are typically 150%—including the proceeds of the short sale plus an additional 50% of the value of the short position.[197] If the stock price goes up, the investor may receive a margin call, which would require the investor to commit additional assets to meet margin requirements. To protect itself from losses, if an investor is unable to meet margin requirements, the broker-dealer may close the short position at a significant loss to the short seller. These dynamics can make it difficult for investors to maintain short positions in highly volatile stocks.

Short selling is facilitated by the securities lending market. Borrowing shares generally occurs two days after the short sale is executed. This is because stock market transactions normally settle two business days after the transaction occurs, while securities lending transactions settle on the same day.[198] Consequently, a short seller (or their broker-dealer) will gauge the ability to borrow shares prior to executing the short sale, referred to as obtaining a ''locate,'' but would actually borrow the share on the day that they are required to deliver the share to settle the stock market transaction.

Short selling is prevalent in equity markets in general. A common ratio used to capture the amount of short selling is the short interest ratio, which measures the fraction of shares sold short at a given point in time divided by the total shares outstanding for that security. Figure 1 below presents the time series average for short interest outstanding for equities with different characteristics. This Figure shows that short interest tends to be higher for small-cap stocks than for mid- or large-cap stocks.

Another way to measure the prevalence of short selling in financial markets is by analyzing the fraction of transactions that involve a short seller. Short sellers are involved in nearly 50% of trading volume, while only about 2% of shares outstanding are held short in the U.S. equity markets.[199] This average volume of short selling tends to be much higher than the typical changes in short interest,[200] suggesting that a significant fraction of short selling volume is reversed very quickly. Such short selling may be more indicative of the fact that short selling is a key component of modern market making strategies and technical algorithmic trading.[201]

BILLING CODE 8011–01–P

[196] *See infra* Part VIII.C.4.i (for a discussion of existing short interest data).

[197] Regulation T specifies that in most situations margin requirements for equity short sales must be 150%. *See* 12 CFR 220.12 (1998), *available at https://www.ecfr.gov/current/title-12/chapter-II/subchapter-A/part-220/section-220.12.*

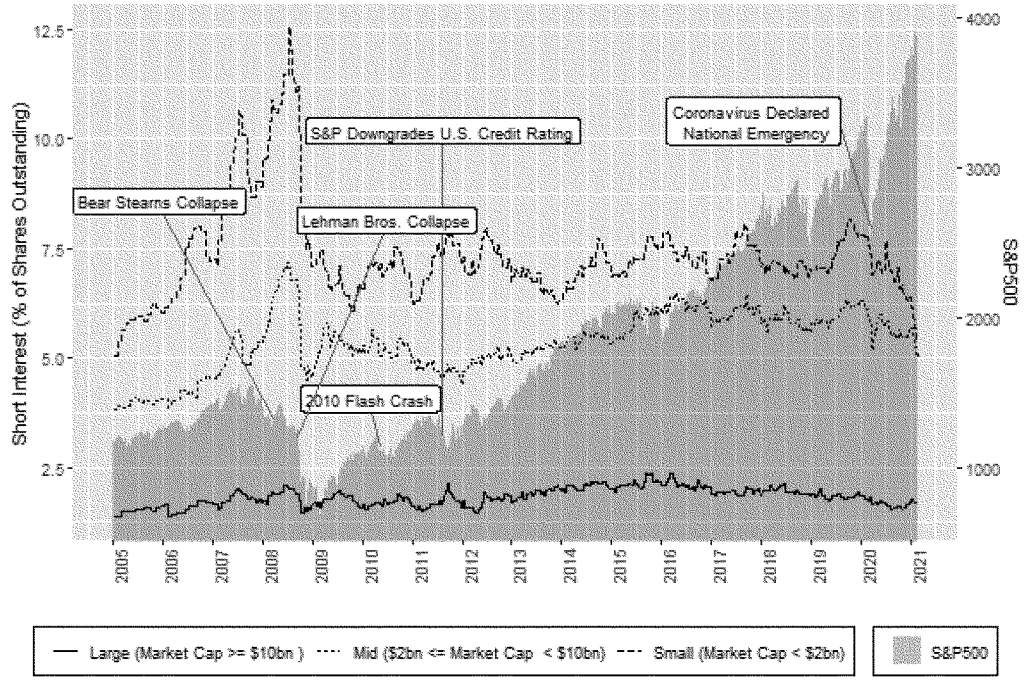
[198] There have been recent efforts by industry members to shorten the settlement cycle to one business day. Furthermore, the Commission has proposed to shorten the settlement cycle. Shortening the Securities Transaction Settlement Cycle, Exch. Act Rel. No. 94196 (Feb. 9, 2022) *available at https://www.sec.gov/rules/proposed/2022/34-94196.pdf.* See also SIFMA, ICI, DTCC and Deloitte, *Accelerating the U.S. Securities Settlement Cycle to T+1* (Ver. 1.0) (Dec. 1, 2021), *available at https://www.sifma.org/wp-content/uploads/2021/12/Accelerating-the-U.S.-Securities-Settlement-Cycle-to-T1-December-1-2021.pdf.*

[199] *See supra* note 6, Figure F.1 in the DERA 417(a)(2) Study (showing that the level of short selling as a percentage of trading volume grew from 2007 to 2013 to about 50%). *See also* D. Rapach, M.C. Ringgenberg, and G. Zhou, *Short Interest and Aggregate Stock Returns,* J. of Fin. Econ. 46–65 (2016).

[200] The Commission analyzed trading volume for common shares during the year 2019. This analysis revealed that the average common share during this period traded approximately five percent of shares outstanding each week, with approximately half of all trades involving short sellers. Consequently, total short selling volume amounts to approximately five percent of shares outstanding every two weeks for a typical stock. In contrast, from 2015–2019, absolute changes in short interest approximately every two weeks have equaled about a half of a percent of shares outstanding. Thus the total amount of short selling volume occurring is an order of magnitude larger than the changes in short interest over the same time period. These statistics suggest that the majority of short selling transactions likely do not involve long term traders building short positions. Additionally, the correlation coefficient for bi-monthly changes in short interest and short selling volume in 2019 is only about 0.018. This low correlation suggests that the economic forces driving total short selling volume and changes in short interest are likely different.

[201] *See infra* Part V.4.iii (for a more detailed discussion of short selling and liquidity provision).

Figure 1: Short Interest Ratio for Non-Financial Common Stocks, Jan. 2005 – Feb. 2021



This figure plots the weighted average short interest ratio for three groups of stocks based on market capitalization on a bi-weekly basis from for January 2005 to February 2021. Large cap stocks are defined as having a market capitalization of greater than $10 billion, mid cap as $2 billion to less than $10 billion, and small cap as less than $2 billion. We estimate the short interest ratio for each stock as the number of shares in short interest reported by the exchanges on a bi-weekly basis and obtained from the Compustat North America Supplemental Short Interest File (for NYSE- and Nasdaq-listed stocks), divided by shares outstanding obtained from the Center for Research in Security Prices, LLC (CRSP) daily stock files. Since short interest is reported as of the settlement date, we match short interest to the trading date two days prior to the short interest report date. The sample includes non-financial (i.e., excluding stocks with SIC code between 6000 and 6999) and common stocks (i.e., CRSP share code of 10 or 11). Following Blocher & Ringgenberg (2019), we discard stocks whose short interest ratio and adjusted short interest ratio (where the adjusted short ratio is adjusted for stock splits, buybacks, etc.) differ by more than 10%, in order to exclude potential asynchronous adjustments for stock splits in the shares outstanding and short interest datasets. Furthermore, stock-date observations for which a stock has multiple *gvkey*'s (Compustat identifier) or *permno*'s (CRSP identifier) per date are removed. We then take the value-weighted average short interest ratio within a group, using market capitalization as weights. Market capitalization is calculated as shares outstanding multiplied by the closing price (obtained from the CRSP daily stock files) two days prior to the short interest record date. S&P 500 values are obtained from the CRSP Index file. *See* Jesse Blocher, Matthew C. Ringgenberg, et al., *When Do Short Sellers Exit Their Positions?*, SSRN (Aug. 27, 2018), *available at* https://ssrn.com/abstract=2634579

BILLING CODE 8011–01–C

ii. Taking Short Positions via Derivatives

Trading in derivatives affects short selling in two key ways. First, derivatives offer investors an alternative means to express negative sentiment rather than short selling the stock. For instance, an investor wishing to profit from the decline of a security's value can also trade in various derivative contracts, including options and security-based swaps. Confirming this alternative means of short selling, academic research shows that investors do indeed use options as an alternative means to obtain short-like economic exposure when standard short selling is restricted.[202]

Among the most popular derivative contracts are options, specifically put and call options. Call options give the owner of the option the right but not the obligation to purchase a stock at a specific price on a future date. Put options are similar, but give the owner

[202] *See* Robert Battalio and Paul Schultz, *Regulatory Uncertainty and Market Liquidity: The 2008 Short Sale Ban's Impact on Equity Option Markets,* 66 J. of Fin. 2013–2053 (2011); B.D. Grundy, B. Lim, and P. Verwijmeren, *Do Option Markets Undo Restrictions on Short Sales? Evidence from the 2008 Short-Sale Ban,* 106 J. of Fin. Econ. 331–348 (2012). *See also* G.J. Jiang, Y. Shimizu, and C. Strong, *Back to the Futures: When Short Selling is Banned* (2019), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420275.*

of the option the right but not the obligation to sell a stock at a specific price at a future date. In a put option the seller of the option is taking a long position in the underlying security while the purchaser of the put is taking a short position. The opposite is true for a call option.

In addition to options, convertible securities (in which the security can be converted into an equity security) and security-based swaps can be used to create the same economic exposure as a short position.[203] Security-based swaps include total-return swaps in which two counterparties agree to exchange or ''swap'' payment with each other as a result of changes in a security characteristic, such as the its price.[204] As with options, in each of these derivative contracts one party is inherently long and the other party is inherently short. These derivatives, and other more exotic derivatives, tend not to be as standardized as options, and are traded over-the-counter. Security-based swap transactions are reported to and publicly disseminated by security-based swap data repositories.[205]

In addition to providing an alternative means of expressing a bearish sentiment, trading in derivatives frequently leads to related trading in the stock market as derivatives' counterparties seek to hedge their risk. For example, an options market maker who sells a put has taken on long exposure to the underlying security and may hedge this position by opening a short position in the underlying security. Thus, option market makers who sell large quantities of put options may amass large short positions in the underlying equities to hedge their options exposure.

3. Current Short Selling Regulations

Compliance with Regulation SHO began on January 3, 2005.[206] The Commission adopted Regulation SHO to update short sale regulation in light of numerous market developments since short sale regulation was first adopted in 1938 and to address concerns regarding persistent failures to deliver and potentially abusive ''naked'' short selling.[207]

In adopting Regulation SHO, the Commission recognized that short sales can provide important pricing information [208] and liquidity to the market.[209] However, the Commission was also concerned with the negative effect that failures to deliver may have on shareholders and the markets. For example, large and persistent failures to deliver may deprive shareholders of the benefits of ownership, such as voting and lending, and sellers that fail to deliver securities on settlement date may attempt to use their failures to engage in trading activities to improperly depress the price of a security.

Due to continued concerns regarding failures to deliver, and to promote market stability and preserve investor confidence, the Commission has amended Regulation SHO on several occasions. For example, the Commission eliminated certain original exceptions to Regulation SHO's close-out requirements,[210] strengthened those same close-out requirements by adopting Rule 204,[211] and reintroduced a short sale price test restriction by adopting Rule 201.[212] In addition, the Commission adopted a targeted antifraud rule, Rule 10b–21, to further address failures to deliver in securities that have been associated with ''naked'' short selling.[213]

[203] On September 19, 2019 the Commission approved the ''Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-based Swap Participants, and Broker-Dealers'' which established a regulatory regime for security-based swaps under Title VII of the Dodd-Frank Act. *See Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers,* Exchange Act Release No. 87005 (Sept. 19, 2019), 84 FR 68550 (Dec. 16, 2019), *available at https://www.sec.gov/rules/final/2019/34-87005.pdf.*

[204] On July 9, 2012, the Commission approved rules and definitions of Security based swaps. *See* 17 CFR 230, 240–241; *Further Definition of* ''*Swap,*'' ''*Security-Based Swap,*'' *and* ''*Security-Based Swap Agreement*''*; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* Commodity Futures Trading Commission and Securities and Exchange Commission, *available at https://www.sec.gov/rules/final/2012/33-9338.pdf.*

[205] *See, e.g., Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563 (Mar. 19, 2015) (''2015 Regulation SBSR Adopting Release''); Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14437 (Mar. 19, 2015); *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Exchange Act Release No. 78321 (July 14, 2016), 81 FR 53545 (Aug. 12, 2016) (''2016 Regulation SBSR Adopting Release''). *See also Order Approving Application for Registration as a Security-Based Swap Data Repository, available at https://www.sec.gov/rules/other/2021/34-91798.pdf.*

[206] *See* Regulation SHO Adopting Release, *supra* note 3.

[207] In a ''naked'' short sale, the seller does not borrow or arrange to borrow the securities in time to make delivery to the buyer within the standard two-day settlement cycle. As a result, the seller fails to deliver securities to the buyer when delivery is due (also known as a ''failure to deliver'').

[208] Efficient markets require that prices fully reflect all buy and sell interest. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security. *See* Exchange Act Release No. 48709 (October 28, 2003), 68 FR 62972 (November 6, 2003), *available at https://www.sec.gov/rules/proposed/34-48709.htm#P179_15857.*

[209] Market liquidity is generally provided through short selling by market professionals, such as market makers, who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers, and reduce the risk that the price paid by investors is artificially high due to a temporary contraction of selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers. *See* Exchange Act Release No. 48709 (October 28, 2003), 68 FR 62972 (November 6, 2003), *available at https://www.sec.gov/rules/proposed/34-48709.htm#P179_15857.*

[210] As initially adopted, Regulation SHO included two major exceptions to its then existing close out requirements: The ''grandfather'' provision and the ''options market maker'' exception. Due to continued concerns regarding failures to deliver, and the fact that the Commission continued to observe certain securities with failures to deliver that were not being closed out consistent with its then existing close out requirements, the Commission eliminated the ''grandfather'' provision in 2007 and the ''options market maker'' exception in 2008. *See* Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544 (Aug. 14, 2007) (eliminating the ''grandfather'' provision to Regulation SHO's close out requirement), *available at https://www.sec.gov/rules/final/2007/34-56212fr.pdf;* Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008) (eliminating the ''options market maker'' exception to Regulation SHO's close out requirement), *available at https://www.sec.gov/rules/final/2008/34-58775fr.pdf.*

[211] In 2008, the Commission adopted temporary Rule 204T, and in 2009 adopted Rule 204. Rule 204 further strengthens Regulation SHO's close out requirements by making those requirements applicable to failing to deliver results from sales of all equity securities, while reducing the time-frame within which failures to deliver must be closed out. *See* Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266 (July 31, 2009), *available at https://www.sec.gov/rules/final/2009/34-60388fr.pdf.*

[212] In 2004, the Commission initiated a year-long pilot to study the removal of short sale price tests for approximately one-third of the largest stocks. After review of the pilot's data, the Commission proposed the elimination of all short sale price tests. In June 2007, the Commission adopted a rule that eliminated all short sale price tests, including Rule 10a–1, a predecessor to Regulation SHO. The rule became effective in July 2007. In 2010, the Commission reinstituted a short sale price test restriction by adopting Rule 201. *See* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010), *available at https://www.sec.gov/rules/final/2010/34-61595fr.pdf.*

[213] Rule 10b–21 is an antifraud provision intended to supplement existing antifraud rules, including Rule 10b–5, and to further evidence the liability of short sellers. This includes broker-dealers acting for their own accounts, who deceive specified persons about their intention or ability to deliver securities in time for settlement, while failing to deliver securities by settlement date. Among other things, the rule highlights the specific liability of short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO's ''locate'' requirement, or who misrepresent to their broker-dealers that they own the shares being sold and subsequently fail to deliver shares. *See supra* note 12, Exchange Act Release No. 58774, *available at https://www.sec.gov/rules/final/2008/34-58774.pdf.*

Regulation SHO requires broker-dealers to properly mark sale orders as ''long,'' ''short,'' or ''short exempt,'' to locate a source of shares prior to effecting a short sale (also known as the ''locate'' requirement), and to close out failures to deliver that result from long or short sales. In addition, if the price of an equity security has experienced significant downward price pressure, Regulation SHO temporarily restricts the price at which short sales may be effected.

Regulation SHO's four general requirements are summarized below:

• *Rule 200—Marking Requirement.* Rule 200(g) requires that a broker-dealer mark all sell orders of any equity security as ''long,'' ''short,'' or ''short exempt.'' A sell order may only be marked ''long'' if the seller is ''deemed to own'' the security being sold and either (i) the security to be delivered is in the physical possession or control of the broker or dealer; or (ii) it is reasonably expected that the security would be in the physical possession or control of the broker or dealer no later than the settlement of the transaction. The ''short exempt'' marking requirement applies only with respect to the Rule 201 short sale price test circuit breaker noted below.

• *Rule 203(b)(1) and (2)—''Locate'' Requirement.* Rule 203(b)(1) generally prohibits a broker-dealer from accepting a short sale order in an equity security from another person, or effecting a short sale in an equity security for its own account, unless the broker-dealer has borrowed the security, entered into a bona-fide arrangement to borrow the security, or has reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due. Rule 203(b)(2) provides an exception to the locate requirement for short sales effected by a market maker in connection with ''bona-fide'' market making activities.

• *Rule 204—Close out Requirement.* Rule 204 requires a participant of a registered clearing agency (*i.e.,* a clearing member) to deliver securities to a registered clearing agency for clearance and settlement on a long or short sale transaction in any equity security by settlement date, or to immediately close out a failure to deliver by borrowing or purchasing securities of like kind and quantity by the applicable close out date. For a short sale, a participant must close out a failure to deliver by no later than the beginning of regular trading hours on T+3. For a long sale, or for activity that is attributable to ''bona-fide'' market making activities, a participant must close out a failure to deliver by no later than the beginning of regular trading hours on T+5.

• *Rule 201—Short Sale Price Test Circuit Breaker.* Rule 201 generally prevents short selling, including potentially manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intraday price decline, and facilitates the ability of long sellers to sell first upon such a decline. Rule 201 contains a short sale circuit breaker that, when triggered by a price decline of 10% or more from a covered security's prior closing price, imposes a restriction on the price at which the covered security may be sold short (*i.e.,* must be above the current national best bid). Once triggered, the price restriction would apply to short sale orders in that security for the remainder of the day and the following day, unless an exception applies.

In addition, Rule 105 of Regulation M generally prohibits participation in secondary offerings by persons who have sold short during the restricted period before the offering.

Regulation SHO imposes certain recordkeeping obligations on broker-dealers. However, the Commission does not have any information on how often the bona fide market making exception is used. Furthermore, bona fide market making information is not reported on a regular basis, instead the Commission must request bona fide market making records on a broker-dealer by broker-dealer basis.[214]

In addition, regulations currently do not require market participants to record, report, or track when short sellers buy-to-cover their short sales. This makes it difficult for regulators to assess compliance with Rule 105 and with close out requirements in Rule 204.

4. Existing Short Selling Data

There are several sources of short selling data that are available both publicly and for regulatory purposes. In general, these data sources lack information about levels of and the timing of changes in economic short exposure for specific managers in specific securities. Some sources report aggregate short positions at the security level, but their content is not granular enough to further the understanding of short selling strategies. Other sources provide granular short volume information, but they are unable to distinguish short transactions that impact short positions from those that do not and do not contain all activity that can change short positions. Some regulatory data sources report short transactions at the individual investor level, but estimating short positions using these data would be significantly inaccurate and inefficient.

i. Bi-Monthly Short Interest Data

One of the primary data sources for aggregate short selling data is the bi-monthly short interest data collected by FINRA.[215] FINRA collects aggregate short interest information in individual securities on a bi-monthly basis as the total number of shares sold short in a given stock as of the middle and end of each month. Then the exchange that lists the given stock, or FINRA itself in the case of OTC stocks, distributes the collected data.[216] FINRA computes short interest using information it receives from its broker-dealer members pursuant to FINRA Rule 4560 reflecting all trades cleared through clearing broker-dealers.[217] FINRA Rule 4560 requires generally that broker-dealers that are FINRA members report ''short positions'' in customer and proprietary firm accounts in all equity securities twice a month through FINRA's web-based Regulation Filing Applications (RFA) system.[218] FINRA defines ''short positions'' for this purpose simply as those resulting from ''short sales'' as defined in Rule 200(a) of Regulation SHO under the Exchange Act.[219] Member firms must report their short positions to FINRA regardless of position size.[220] The process of gathering and validating short interest data takes approximately two weeks.[221] Thus the data is available with approximately a two week lag.

These short interest data are widely available and are used by academics and

[214] *See supra* Part VI.B (Reliance on Bona Fide Market Making Exception, for more information on the inefficiencies of not having a systematic way of capturing bona fide market making activities).

[215] *See supra* note 6, DERA 417(a)(2) Study at 17–18.

[216] *See Short Interest—What It Is, What It Is Not,* FINRA Inv'r Insights (Apr. 12, 2021), *available at https://www.finra.org/investors/insights/short-interest.*

[217] *Id.* (Short interest for a listed security at any date reported by FINRA is ''a snapshot of the total open short positions in a security existing on the books and records of brokerage firms on a given date.'').

[218] FINRA Rule 4560 excludes short sales in ''restricted equity securities,'' as defined in Securities Act Rule 144, from the reporting requirement.

[219] *See* FINRA Rule 4560(b)(1).

[220] *See* FINRA Market Regulation Department, *General for Short Interest Reporting Instructions,* (Dec. 18, 2008) (reporting instructions to FINRA member firms), *available at https://www.finra.org/Industry/Compliance/RegulatoryFilings/ShortInterestReporting/P037072.*

[221] *See supra* note 6, DERA 417(a)(2) Study at 17–18.

other market participants.[222] These short interest data are found to predict future stock and market returns over the monthly and annual horizons, suggesting that the bi-monthly short interest data capture the economic short selling based on fundamental research.[223] However, these data face two major limitations.[224] First, the information content does not provide insight into the timing with which short positions are established or covered over the two-week reporting period. This precludes the possibility of understanding the behavior of aggregate economic short selling in the two weeks leading up to the reporting date of the positions. Second, given that short interest is aggregated at the security-level, the aggregation prevents the Commission and the public from understanding certain aspects of the underlying short selling activity. For example, the data cannot inform on whether short sentiment is broadly or narrowly held or the extent to which existing short interest is hedging in nature or based on short sentiment.

ii. Short Selling Volume and Transactions From SROs

Since 2009, many SROs have been publishing two short selling data sets, including same day publication of daily aggregated short sale volume in individual securities [225] and publication of short sale transaction information on no more than a two-month delay.[226] Some SROs make the historical daily short volume data available to market participants for a fee.[227] The fact that market participants and academic users pay these subscription fees indicate that these data are utilized. In addition to these daily short volume data, FINRA provides intraday short sale transaction information for the orders that execute and information from FINRA's Trade Reporting Facility (''TRF'') and Alternative Display Facility (''ADF'') [228] (the TRF and ADF are together referred to herein as ''FINRA's Reporting Facilities''). Overall, these different sources of daily and intraday short volume data provide greater, though different, levels of granularity relative to the bi-monthly short interest observations discussed earlier.

Despite offering higher granularity, these existing short volume data provided by the SROs and FINRA have a number of limitations. First, the data does not provide insight into the activities of either individual traders, or different trader types. Consequently, it is not possible with existing short selling data provided by the SROs and FINRA to separate trading volume associated with market makers, algorithmic traders, investment managers, or other trader types.

Additionally, the data does not provide insight into activities that may reduce short exposure, thus using these data to estimate investor sentiment is fraught. For example, these data provide information only on short sales, whereas short positions could also change because investors can increase or decrease their positions in ways other than short selling the stock. For example, investors can increase their short positions by exercising put options and delivering borrowed shares or by delivering borrowed shares when they are assigned call options. Investors can reduce their short positions in an equity when they, for example, buy to cover their positions, purchase shares in a secondary offering, convert bonds to stock, or redeem ETF shares containing the equity. As a result of this, the short selling volume and transactions data cannot easily explain changes in short interest, exposing a gap between these two types of existing data.

Aggregate short selling statistics and short selling transactions data have different lags with which they are available. Aggregate short selling volume statistics are usually put out by the SROs by the end of the following business day. For the transactions data, the lag can be much longer, and in some cases the data is released with a one month lag—implying that some short selling transactions data are not available for two months.

There is also a concern that these data may over-represent the total volume of short sales occurring in the market. This is because Regulation SHO provides specific criteria regarding what is a long sale.[229] If a market participant is unclear whether their trade would meet all the requirements at settlement to be marked a long sale, then they may choose to mark the trade as short to not run afoul of Regulation SHO requirements, even if the trade is likely an economic long sale.[230]

iii. Securities Lending

Securities lending data provides information on stock loan volume, lending costs, and the percentage of available stock out on loan, which some market participants use as measures of short selling.[231] The securities lending

[222] *See supra* note 182 (FINRA and the listing exchanges make these data publicly available with bi-weekly updates).

[223] *See, e.g.,* Peter N. Dixon and Eric K. Kelley, *Business Cycle Variation in Short Selling Strategies: Picking During Expansions and Timing During Recessions,* J. of Fin. and Quantitative Analysis (Forthcoming); see also Ekkehart Boehmer, Zsuzsa R. Huszar, and Bradford D. Jordan, The Good News in Short Interest, 96 (1) *Journal of Financial Economics* 80–97 (2010); Stephen Figlewski, *The Informational Effects of Restrictions on Short Sales: Some Empirical Evidence,* 16 (4) J. of Fin. and Quantitative Analysis 463–476 (1981).

[224] *See supra* note 33.

[225] *See Short Sale Volume and Transaction Data, available at https://www.sec.gov/answers/shortsalevolume.htm;* (showing hyperlinks to the websites where SROs publish this data). *See also supra* note 183. *See, e.g., FINRA's Daily Short Sale Volume Files* (which provide aggregated volume by security on all short sale trades executed and reported to a FINRA reporting facility during normal market hours). *See* FINRA Information Notice, *Publication of Daily and Monthly Short Sale Reports* (Sept. 29, 2009), *available at https://www.finra.org/sites/default/files/NoticeDocument/p120044.pdf.*

[226] *See FINRA's Monthly Short Sale Transaction Files* (which provide detailed trade activity of all short sale trades reported to a consolidated tape. *See supra* note 183; *See also* Short Sale Volume and Transaction Data, *available at https://www.sec.gov/answers/shortsalevolume.htm.* Additional transaction data has been available at various times, including transaction data from the Regulation SHO Pilot, which has been discontinued by most exchanges in July 2007 when the uptick rule was removed. *See* Exchange Act Release No. 55970 (Jun. 28, 2007), 72 FR 36348 (July 3, 2007), *available at https://www.sec.gov/rules/final/2007/34-55970.pdf.* The Pilot data comprised short selling records available from each of nine markets: American Stock Exchange, Archipelago Exchange, Boston Stock Exchange, Chicago Stock Exchange, NASD, Nasdaq Stock Market, New York Stock Exchange, National Stock Exchange, and the Philadelphia Stock Exchange. *See* SEC Division of Trading and Markets, Regulation SHO Pilot Data FAQ, *available at https://www.sec.gov/spotlight/shopilot.htm#pilotfaq.*

[227] *See, e.g.,* TAQ Group Short Sale & Short Volume, *New York Stock Exchange, available at https://www.nyse.com/market-data/historical/taq-nyse-group-short-sales* (for short sale data relating to all NYSE owned exchanges). *See* Short Sale Volume and Transaction Reports from Nasdaq Trader, *available at https://nasdaqtrader.com/Trader.aspx?id=shortsale* (for short sale data for Nasdaq exchanges); see also Short Sale Daily Reports, *Chicago Board Options Exchange,* (for Cboe exchanges) *available at https://www.cboe.com/us/equities/market_statistics/short_sale/.*

[228] Each TRF provides FINRA members with a mechanism for the public reporting of transactions effected otherwise than on an exchange. *See* FINRA, *Market Transparency Trade Reporting Facility, available at https://www.finra.org/Industry/Compliance/MarketTransparency/TRF/.*

[229] *See* Rule 200(g) of Regulation SHO specifies when an order can be marked as long. *See also* Part III.B; note 4 Regulation SHO Adopting Release.

[230] *See* 2009 letter from Securities Industry and Financial Markets Association (''SIFMA'') commenting on an alternative short sale price test, expressing concern that compliance with Regulation SHO short selling marking requirements ''will result in a substantial over-marking of orders as ''short'' in situations where firms are, in fact, ''long'' the securities being sold.'' Letter from Securities Industry and Financial Markets Association (''SIFMA Letter''), *available at https://www.sec.gov/comments/s7-08-09/s70809-4654.pdf.*

[231] Several commercial entities sell data on securities lending to clients. *See, e.g.,* 2011 Letter from Data Explorers (''Data Explorers Letter'') (in response to the request for comment relating to the proposed study of the cost and benefits of short selling required by Dodd Frank Act Section

industry appears to use securities lending data widely, though it is generally available only by subscription.[232]

The use of security lending data as proxy for economic short interest is associated with at least two major setbacks. First, commercial vendors of the securities lending data often impose access restrictions via high nominal subscription fees or give-to-get models. In this setting, the entities contributing data are mindful of whether other entities can access to the data. As such, participation rates in data sharing reflects strategic considerations that may lower the extent of data shared by each entity, reducing the information content of the pool of the data collected by each vendor. The market for these data is dominated by three major vendors, making it difficult for a given market participants to obtain access to comprehensive security lending in formation from one source. To this end, the existing data accessible by an individual market participant may not accurately proxy short selling activity. Second, while securities lending may be correlated with short selling, it is not a perfect measure of short selling. In practice, securities lending may be used for purposes other than short sales such as to cover failure to deliver or to borrow cash. In addition, short selling that is covered within the trading day does not require any loans, and vendors of commercial securities lending data do not have complete information. For example, they have less than 100% of the negotiated loans and no information on borrowing from margin accounts.[233]

417(a)(2)), *available at https://www.sec.gov/comments/4-627/4627-152.pdf.* As some commenters have noted, stock lending facilitates short selling. *See, e.g., Speech by Chester Spatt, former Chief Economist of the SEC* (April 20, 2007), *available at https://www.sec.gov/news/speech/2007/spch042007css.htm.* The information sold by vendors may include volume of loans, lending costs, and the percentage of available stock out on loan. This data offers indirect evidence of short selling, and some research has used stock lending data as a proxy for actual short sales. *See, e.g.,* Oliver Wyman, *The Effects of Short Selling Public Disclosure of Individual Positions on Equity Markets,* Alternative Investment Management Association (Feb. 2011), *available at https://www.oliverwyman.com/our-expertise/insights/2010/feb/the-effects-of-short-selling-public-disclosure-regimes-on-equity.html.*

[232] *See supra* note 6, DERA 417(a)(2) Study at 22–23.

[233] *See supra* note 6, DERA 417(a)(2) Study at 23. The Commission has recently proposed a new rule, Rule 10c–1, and if adopted as proposed, the Commission and market participants would have access to comprehensive securities lending data market data that would significantly improve current securities lending based short selling estimates. *See* Reporting of Securities Loans, Exchange Act Release No. 93613, *available at https://www.sec.gov/rules/proposed/2021/34-93613.pdf.*

iv. CAT Data

Regulators can also extract short sale information from CAT data, which provides order lifecycle information for stocks and options.[234] The data contain an order mark that is a part of the ''material terms of the trade'' that indicates whether an order is a short sale. This order mark allows regulators to identify traders who are short selling and to see the order entry and execution times of these short sales. However, CAT was not designed to track traders' positions or changes in those positions, but rather collects information to analyze trading and order lifecycles. As such, using CAT data to estimate positions and changes in those positions can be challenging.

Theoretically, one could use the order execution information in CAT data to estimate trader positions and track how those positions change over time. However, such estimates could be inaccurate in several circumstances. First, CAT data do not include information on the long or short positions held in each account at the time that Industry Members started reporting, so CAT does not provide an appropriate starting point for building short positions using investor-specific transaction information. Second, some investors may establish or cover short positions via other means that are not CAT reportable events, for example: Secondary offering transactions; option assignments; option exercises; conversions; or ETF creations and redemptions. Additionally, until the Customer Account Information System (CAIS) system goes live, which is expected in July 2022, there is no easy way to match Firm Designated ID (FDIDs) in CAT to individual Managers. Thus it is not currently feasible to identify the subset of CAT data pertaining to Managers. However, once the CAIS system goes live it would be possible for regulators to identify individuals in CAT, even if those individuals use multiple broker-dealers.

CAT is not designed to track positions. However, when focused on one or few accounts, estimating positions, though potentially inaccurate, can be manageable. Using transaction information to track positions across a broad set of positions is inefficient. Even in situations in which the above limitations do not apply, the use of CAT data to estimate short positions and changes in those positions for all or a large set of accounts is inefficient and would require a tremendous amount of processing power, which would take time and reduce the processing power available for other CAT queries. This hinders the Commission's estimation of short positions in a timely fashion.

Other than the inefficient means of estimating positions described above, CAT does not distinguish buy orders that establish a long position from those that cover, and therefore reduce, a short position. While Commission staff were able to identify some short covering activity during the volatile period in January 2021, due to the difficulties described above, the staff analyzing the volatility associated with meme stocks could not easily identify short covering activity using CAT data alone and was thus hindered in their reconstruction of key events.

Finally, even though CAT data identifies short selling by market makers, the data do not provide information as to whether a broker-dealer is claiming use of the Regulation SHO exceptions for bona fide market making.

There are 24 national securities exchanges and one national securities association (FINRA) that are CAT Plan Participants. There are also 3,734 broker-dealers who have reporting obligations to CAT, as Industry Members. These Industry Members often us third-party reporting agents such as service bureaus for CAT reporting.

[234] It is important to note that only regulators have access to CAT data.

v. Exchange Act Form SH

For a ten-month period in 2008 and 2009,[235] the Commission required certain institutional investment managers to submit confidential weekly reports of their short positions in Section 13(f) securities, other than options, on Exchange Act Form SH, through Temporary Rule 10a3–T.[236] *De minimis* short positions of less than 0.25% of the class of shares with a fair market value of less than $10 million were not required to be reported.[237] Additionally, only Managers that

[235] *See supra* note 6, DERA 417(a)(2) Study at 18.

[236] With respect to each applicable Section 13(f) security, the Form SH filing was required to identify the issuer and CUSIP number of the relevant security and reflect the manager's start of day short position, the number and value of securities sold short during the day, the end of day short position, the largest intraday short position, and the time of the largest intraday short position. The reporting requirement was implemented via a series of emergency orders followed by an interim final temporary rule, Rule 10a3–T. Exchange Act Release No. 58591 (Sept.18, 2008), 73 FR 55175 (Sept. 24, 2008); Exchange Act Release No. 58591A (Sept. 21, 2008), 73 FR 58987 (Sept. 25, 2008); Exchange Act Release No. 58724 (Oct. 2, 2008), 73 FR 58987 (Oct. 8, 2008); Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

[237] *See* Exchange Act Release No. 58591 (Sept. 18, 2008), 73 FR 55175 (Sept. 24, 2008).

exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of at least $100 million were required to report. The investment manager was required to report short positions to the Commission on Form SH on a nonpublic basis on the last business day of each calendar week immediately following any calendar week in which it effected short sales,[238] a more frequent disclosure interval than the quarterly public reporting of long positions required on Exchange Act Form 13F.[239]

In addition to the limited and temporary time period during which disclosure of short positions was required to be reported on Exchange Act Form SH, even at the regulatory level, the reporting requirements and data had several drawbacks and limitations. One drawback was that only Managers who exercised investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of at least $100 million were required to file Form SH, which excluded short-only funds and other large short sellers who did not file Form 13F. Additionally, the report was costly as Managers filing Form SH had a weekly reporting requirement. Additionally, data fields in Form SH including start of day short position, gross number of securities sold short during the day, and end of day short position were each subject to the *de minimis* reporting threshold, which resulted in unreported data points when only a subset of the fields exceeded the *de minimis* threshold. Furthermore, Form SH data were not validated for errors such as duplicate entries, missing fields, or positions that were below the *de minimis* threshold and therefore did not need to be reported, which make the data difficult to work with.[240]

5. Competition

Many Managers operate in the investment management industry.[241] In broad terms, investment management is a highly competitive industry. Investment managers compete for investors and investor funds. Among the bases on which Managers compete are returns, fees and costs, trading strategies, risk management, and the ability to gather information. It is costly for investment managers to do market research to gain an informational advantage. Investment managers who own a security have an advantage over those who don't in that a security owner can more cheaply trade on negative information by simply selling whereas investment managers not owning the same security must establish some form of short exposure, such as selling a security short, to capitalize on any negative information that they've uncovered. Academic research suggests that when the cost of short selling increases, a security owner's advantage in terms of being able to profitably trade on gathered information increases, leading investors not owning a security to engage in less fundamental research.[242]

Investment managers, like other investors that could be subject to Proposed Rule 13f-2, also compete by using proprietary trading strategies. They typically seek to trade in ways that would not expose their strategies because, if their strategies became known to others, the strategies could lose value and such Managers could also suffer higher trading costs. More specifically, other traders could use copycat trading strategies try to mimic the Managers' strategy, potentially competing away the profitability of the strategy or other traders could anticipate when the Managers might trade, which could result in higher trading costs for the Manager. Some Managers also compete for returns by engaging in securities lending whereby assets are lent to other investors, often short sellers, for a fee. These fees in aggregate can be substantial.[243]

Additionally, there are 3,734 broker-dealers. These broker-dealers also compete with each other for order flow. The broker-dealer industry is a highly competitive industry with reasonably low barriers to entry. Most trading activity is concentrated among a small number of large broker-dealers, with thousands of small broker-dealers competing for niche or regional segments of the market. To limit costs and make business more viable, the small broker-dealers often contract with bigger broker-dealers to handle certain functions, such as clearing and execution, or to update technology. Larger broker-dealers often enjoy economies of scale over smaller broker-dealers and compete with each other to service the smaller broker-dealers who are both their competitors and customers.[244] Broker-dealers compete in multiple ways: reputation, convenience, and fees. Broker-dealers typically pass operating costs down to their customers in the form of fees.

D. Economic Effects [245]

1. Investor Protection and Market Manipulation

The Proposals could lead to better investor protection by improving regulators' reconstruction of significant market events. They may also assist regulators in identifying manipulative short selling strategies. Improved identification of manipulative short selling strategies may also serve as a deterrent to would be manipulators and thus may help prevent manipulation. They would also improve the Commission's observation of systemic risk. However, to the extent that Managers may still be holding their short positions when the data becomes public, the Commission believes that Proposed Rule 13f–2 and Proposed Form SHO also could in some cases facilitate potentially manipulative strategies, such as certain short squeezes. The Commission also believes that Proposed Rule 205 and the Proposal to Amend CAT would improve regulators' oversight of markets.

The Commission believes that the Proposals would enhance the Commission's and SRO's reconstruction of significant market events by providing a clearer view into the role that short selling plays in market events of interest. Specifically, the Commission could have used the buy to cover information that would be provided by Proposed Rule 205 and data from Proposed Form SHO to reconstruct market events and better understand the link between short sellers exiting their positions and contemporaneous price volatility during the recent volatility associated with meme stocks. For example, while short sellers as a whole were exiting their positions during the

[238] *See* Exchange Act Release No. 58785, 73 FR at 61678.

[239] *Id.*

[240] *See supra* note 80 (information on the methodology and caveats of using Form SH data).

[241] *See supra* Part VIII.C.1.

[242] This occurs because if an investor not owning the asset engages in fundamental research and discovers evidence that a stock may be overpriced, then it is costly for that investor to act on that information. This is not true for investors who own the asset as they can simply sell the shares that they own. *See, e.g.,* Peter N. Dixon, *Why Do Short Selling Bans Increase Adverse Selection and Decrease Price Efficiency?,* 11 (1) The Rev. of Asset Pricing Studies 122–168 (2021).

[243] The securities lending market is large and complex. *See* Part VI.B. (the proposing release for proposed Rule 10c–1 for a more detailed description of this market and players), *available at https://www.sec.gov/rules/proposed/2021/34-93613.pdf.*

[244] *See* CAT proposing release Part VII.A, *available at https://www.sec.gov/rules/proposed/2010/34-62174.pdf.*

[245] In preparing this economic analysis, the Commission accounted for the various types of Managers that could be subject to the reporting requirements. In general, the Commission believes that the economic effects of the rule are more influenced by the Managers' investment strategy and motivation for short selling rather than by the type of Manager that is reporting. Any exceptions are noted in the analysis. *See supra* Section VIII.C.1.

period of heightened volatility it may have been the case that large short sellers were acting differently.

The data that would be provided in Proposed Form SHO would have provided information the Commission could have used after the fact to examine separately short selling behavior of large short sellers. Additionally, because short positions often take some time to create, the Commission could have attempted to quickly identify individual short sellers with large short positions in the various meme stocks in January 2021 based on the most recent reports; then the Commission could have used the enhanced CAT data to understand how these short sellers traded during the heightened volatility.[246]

Additionally, the activity data provided in Proposed Form SHO would allow the Commission to observe how large short sellers responded to the heightened volatility, albeit with a time lag due to the filing deadline. Specifically, the Commission would be able to observe more precisely which days reporting short sellers were most actively increasing or decreasing their short positions and correlate that activity to market conditions on those days. The ''activity categories'' reported in Proposed Form SHO would allow regulators to identify the specific means by which large short sellers alter their economic short exposure on high volatility days. For example, economic short exposure may increase due to increased number of shared sold, issuing call options, exercising put options, as well as other activities that could raise the Manger's short position. In contrast, economic short exposure may decrease due to purchase of shares to cover short positions, exercising call options, issuing put options, obtaining shares through secondary offerings or tendered conversions, and other activities that reduce short exposure. Receiving data about each of these categories separately would facilitate more efficient oversight by regulators.

Analysis of the data during periods of high volatility could help the Commission maintain fair and orderly markets by highlighting key economic channels and mechanisms through which short selling could affect periods of volatility or how periods of volatility affect short selling. This information can, in turn, allow the Commission to more specifically tailor responses to similar or related events in the future. While the CAT data provided by Proposed Rule 205 and the CAT amendment data would be provided relatively quickly, the Proposed Form SHO data would not be available for up to a one-month lag. Consequently, while the Proposed Form SHO data would be useful in recreating a significant market event after the fact, it would not provide the Commission tools to examine an immediate crisis.

The ''bona fide market making'' information from the Proposal to Amend CAT would facilitate regulatory analysis of the use of the bona fide market making exceptions to Regulation SHO.[247] The bona fide market making information from the Proposal to Amend CAT would provide regulators investigating potential Regulation SHO violations with more regular access to clearer evidence of whether a market maker was relying on a bona fide market making exception. This could save a significant amount of time during an investigation. Having regular access to these data would provide the Commission with insight into whether the exceptions for bona fide market making in Regulation SHO Rules 203 and 204 are being used appropriately, which should assist in assessing compliance with, and thus the benefits of, Regulation SHO.

The ''bona fide market making'' information and hedge information could improve regulators' ability to interpret certain information in market reconstructions. Market reconstructions can sometimes benefit from regulators knowing when certain activity is either directional or market neutral because the motives and profitability of such trading types are different. The 'bona fide market making' information would help regulators separate short selling that represents market makers' liquidity provision to facilitate investor demand from other short selling, including other market maker short selling. Because such short selling is more likely to be in response to customer demand, the shorts are less likely to signify that the short seller anticipates a price decline than if the short seller was trading directionally. Likewise, the hedging information on Proposed Form SHO would provide information on whether a Manager's position is fully or partially hedged at the end of the month. From this, regulators could assess, for example, that the activity reported on Proposed Form SHO during the month was likely not related to hedging activity if the end of month position is not hedged, particularly if the previous month's position was not hedged.

Additionally, the data provided by Proposed Rule 13f–2 and Proposal to Amend CAT would allow the Commission to detect certain types of fraud in a timelier manner. The data provided by Proposed Rule 13f–2 would improve the timeliness of fraud detection because the Proposed Form SHO data would provide the Commission quick flags that may signal potential fraud. Additionally, the enhanced CAT data would provide the Commission with regular access to improved information with which to examine potential instances of fraud without needing to ask broker-dealers for information.

Improved detection of fraud may also help deter fraud, improving price efficiency and market quality. Some market participants and academics have raised concerns that short selling may in some instances offer the potential for stock price manipulation, including ''short and distort'' campaigns.[248] In

[246] It is currently not straightforward to map CAT transactions to individual traders as the Firm Designated ID (FDID) assigned to each account are broker-dealer specific. Thus to map a trade reported in CAT to an individual trader would require requesting the specific FDID for a given trader. This lack in functionality is expected to change when the CAIS becomes operational. This system would allow regulators to map individual traders to their FDID's and thus pull CAT information specifically for individual traders. Thus, while technically feasible, pulling data from CAT for specific traders is difficult, but will become much less so when the CAIS system becomes operational. The CAIS system is expected to go live in July 2022. *See* Timeline, Consolidated Audit Trail, *available at https://www.catnmsplan.com/timeline.* Additionally, some academics have critiqued the Commission Staff's GameStop report, the Report on Equity and Options Market Structure Conditions in Early 2021, *available at https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf,* and some of its methods, which were driven by data availability. *See* Joshua Mitts, Robert Battalio, Jonathan Brogaard, Matthew Cain, Lawrence Glosten, and Brent Kochuba, *A Report by the Ad Hoc Academic Committee on Equity and Options Market Structure Conditions in Early 2021* (working paper) (2022), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4030179.*

[247] Two Regulation SHO rules include exceptions for bona fide market making. Rule 203(b)(2)(iii) exempts market makers selling short in connection with bona fide market making activities from the requirement that a short seller must either borrow or have reasonable grounds to believe he can borrow a security in time for delivery prior to effecting a short sale. *See* 17 CFR 242.203(b)(2)(iii). Rule 204(a)(3) provides that a failure to deliver positions attributable to bona fide market making activities by registered market makers, options market makers, or other market makers obligated to quote in the over-the-counter markets, must be closed out by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date (T+5), rather than the settlement day following the settlement date (T+2). *See* 17 CFR 242.204(a)(3).

[248] *See, e.g.,* Comment letters submitted with regards to Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2); *See* letters from Naphtali M. Hamlet (May 6, 2011); Jan Sargent (May 6, 2011); Lee R. Donais, President and CEO, L.R. Donais Company (May 8, 2011); Joseph A. Scilla (May 9, 2011); Jane M. Reichold (May 17, 2011); John Gensen (May 18, 2011); Victor Y. Wong (May

Continued

''short and distort'' strategies, which are illegal, the goal of manipulators is to first short a stock and then engage in a campaign to spread unverified bad news about the stock with the objective of panicking other investors into selling their stock in order to drive the price down.[249] If a ''short and distort'' campaign is suspected, then detecting this behavior via the activity and positions data in Proposed Form SHO would be easier than it would be using current data. Short and distort campaigns are more likely to occur in stocks with lower market capitalizations with less public information.[250] Consequently, among these stocks it may not, in dollar terms, take a very large short position to reach the 2.5% threshold in securities of smaller reporting issuers or the $500,000 threshold in securities of non-reporting issuers to report Proposed Form SHO. [251] As a result, it is likely that an entity engaging in such a practice would be required to report Proposed Form SHO data. Consequently, if ''short and distort'' type behavior were to be suspected, then the Commission would be more likely to identify individuals with large short positions and could thus quickly focus any inquiries on entities in an economic position to potentially profit from manipulation. Then regulators could match buy to cover trading on individual days to statements or other actions of the investor which may indicate that the investor was engaging in such behavior. Regulators could then use CAT data to investigate further the trading activity of the alleged manipulator.

There are other manipulations, which the data from the Proposals would help regulators identify. For example, one theoretical study suggests that if managers' decision-making is influenced by shifts in stock prices, then short sellers could potentially negatively affect managerial decisions by depressing stock prices when profitable projects are announced, which may lead managers to believe that their project is not good and to abandon it. [252] Doing so may lead to worse managerial decision making and lower stock prices. Another theoretical study argues that due to high levels of leverage and interconnectedness in the finance industry, if short sellers are successful at causing even small declines in stock price, then this can ripple through the financial system with large effects. [253] While the Commission notes that there is currently no empirical evidence that these types of manipulation occur or are widespread, should they be suspected, these types of manipulation could better be identified with the positions and activity data. The positions data would allow the Commission to quickly identify individuals with large short positions and then use the activity and CAT data to investigate their trading behavior to look for signs of manipulation. Improved detection capacity may also lead to decreased fraud as would be manipulators choose not to engage in manipulative behavior due to increased fear of detection.[254]

Publicly releasing aggregated information about large short positions may, in some instances, increase the risk of trading behavior harmful to short sellers, namely short squeezes, though the Commission's improved detection of such potential manipulation could help deter it. The Commission estimates that 32% of stocks reported on Proposed Form SHO would only have one Manager above the reporting Threshold A.[255] If market participants can ascertain which positions belong to only one Manager,[256] then market participants may seek to orchestrate a short squeeze targeting that particular manager. Mitigating this risk is the fact that the data provided by Proposed Rule 13f–2, Proposed Form SHO and the Proposal to Amend CAT, particularly the activity data provided in Proposed Form SHO may allow the Commission to more quickly determine if a short squeeze occurred. The Commission could correlate buy-to-cover activity in Proposed Form SHO with price increases to look for signs of a squeeze. If it appears that a short squeeze may have occurred, the Commission could perform further analysis using the information in the Proposal to Amend CAT to attempt to determine the market participants involved in the squeeze.[257] Increased risk of detection may deter some market participants from seeking to orchestrate a short squeeze. The Reporting Threshold, aggregating the data by security prior to releasing it to the public, and the delay in releasing the data to the public are all designed to help mitigate this effect. Only Managers whose positions surpass the threshold would be required to report—limiting the number of Managers whose information would be aggregated and made public.

Despite not releasing Managers' identities to the public, the nature and the position size thresholds that underlie publicly released information may lead to the risk of Managers being identified by the public. Focusing on stocks in which market participants can ascertain that only one Manager filed, combined with a Manager's posts on social media, or other means, such as information discovered by a private investigator, market participants may be able to identify which Manager holds

20, 2011); Kevin Rentzsch (May 24, 2011); Lynn C. Jasper (May 27, 2011); Donald L. Eddy (May 28, 2011); Al S. (Jun. 10, 2011); Jeffrey D. Morgan, President and CEO, National Investor Relations Institute, at 3 (Jun. 21, 2011) (''NIRI''); Professor James J. Angel, at 2 (June 24, 2011); and Dennis Nixon, CEO and Chairman, International Bancshares Corporation, at 1 (July 18, 2011). *See* all letters are *available at https://www.sec.gov/comments/4-627/4-627.shtml.*

[249] If successful, the scheme can drive down the price, allowing the manipulators to profit when they ''buy-to-cover'' their short position at the reduced price. Short sellers could also engage in price manipulations by systematically taking short positions in one firm while taking long positions in the competitor. *See* Bodie Zvi, Alex Kane, and Alan J. Marcus, Investments and Portfolio Management, *McGraw Hill Education* (2011). *See also* Rafael Matta, Sergio H. Rocha, and Paulo Vaz, Predatory Stock Price Manipulation, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551282.*

[250] *See, e.g.,* Y. T. F. Wong and W. Zhao, Post-Apocalyptic: The Real Consequences of Activist Short-Selling. (Working Paper) (2017), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941015.*

[251] Academic research has found that the average short interest in stocks targeted by activist short sellers is about ten percent, while it is only four percent for non-targeted firms. Consistent with high information asymmetries, targeted firms also appear to have wider bid-ask spreads and higher disagreement among analysts. *See* W. Zhao, Activist Short-Selling and Corporate Opacity (Working Paper) (2020), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852041.*

[252] *See* I. Goldstein and A. Guembel, *Manipulation and the Allocational Role of Prices,* 75 (1) The Rev. of Econ. Studies 133–164 (2008).

[253] *See* Markus K. Brunnermeier and Martin Oehmke, *Predatory Short Selling,* 18 (6) Rev. of Fin. 2153–2195 (2014). Similarly, some have also asserted that short sellers may have played a role in the stock market crash at the beginning of the Great Depression. *See, e.g.,* Jonathan R. Macey, Mark Mitchell, and Jeffry Netter, *Restrictions on Short Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash,* 74 Cornell L. Rev. 799, 801–802 (1989) (collecting reports of such allegations).

[254] *See* letters from Christine Lambrechts (hereafter ''Lambrechts Letter''), *available at https://www.sec.gov/comments/4-627/4627-14.htm; see also* International Association of Small Broker Dealers and Advisor, *available at https://www.sec.gov/comments/4-627/4627-109.pdf. See* NIRI Letter, *available at https://www.sec.gov/comments/4-627/4627-134.pdf.*

[255] Based on analysis of Form SH data. *See supra* note 80 (for information on the methodology and caveats of using Form SH data).

[256] In many cases identifying which publicly released reports had only one Manager reporting may not be difficult. For example, if the total short positions reported in security with a market capitalization greater than $400 Million (where the $10 Million dollar threshold is hit before the percent of shares outstanding threshold) are less than $20 million then market participants may be able to reasonably presume that there is only one Manager reporting a position.

[257] Identifying the market participants involved in fraud solely from CAT data is currently difficult, but would become less so when the CAIS system becomes fully operational.

the short position.[258] As such, the limited number of reporters potentially risks shining a spotlight on the few managers with large short positions. However, the delay before publicly releasing the data means that the information would not be as fresh and thus may not as accurately reflect current short positions.[259] Thus, if market participants sought to orchestrate a short squeeze based on the aggregated information made public based on the Proposed Form SHO data that the squeeze could fail if the short positions that are the target of the squeeze no longer exist. This may reduce the likelihood that market participants seek to orchestrate squeezes based on the publicly released Proposed Form SHO data which may help protect short sellers who maintain short positions for a longer horizon and thus may still hold the positions reported on the aggregated Proposed Form SHO data. Based on analysis using Form SH data, the Commission expects that most, but not all, of the short positions leading to reporting on Proposed Form SHO would be closed by the time that the aggregated Proposed Form SHO data is released.[260]

Having detailed information about which Managers currently hold large and unhedged short positions may also help the Commission observe potential systemic risk concerns regarding short selling. Large and concentrated short positions have the potential to increase systemic risk. As discussed previously, unlike a long transaction, short selling places an investor at risk of losing significantly more than their initial investment should the value of the underlying asset increase significantly. Even temporary spikes in asset value can lead to significant losses—by triggering margin calls or even positon liquidations if capital requirements cannot be met.[261] If the value of an underlying asset increases, a short seller may be required to post additional collateral to meet margin requirements. If the investor is unable to do so, then the investor's broker-dealer may liquidate the investor's position with existing collateral leading to steep losses for the short seller. Consequently, it may be more difficult for a short seller to ride out periods of turbulence than a long seller.

Manager level short position data of individuals with large short positions could allow the Commission to better observe these positions and more appropriately respond to any market events that arise. For example, in the context of the meme stock phenomenon in January 2021, if the Commission had the Proposed Form SHO data at the time then it would have had a clearer view as to which Managers held large short positions prior to the volatility event and thus which Managers were at greatest risk of suffering significant harm from a short squeeze.

All the effects, positive and negative, associated with the data collected by Proposed Rule 13f–2 discussed in this section would be limited by several factors. First, upon filing Proposed Form SHO would be checked for technical errors but not for the accuracy of the position and activity data in the Form. If Managers make mistakes in their calculations, such mistakes would reduce the utility of the data. However, the amendment process would require Managers to amend filings when they discover errors, thus promoting the accuracy of the information. The Commission also recognizes that there are limitations to Proposed Rule 205. For example, broker-dealers would be required to mark transactions as buy to cover based only on information that they currently have access to and they would not be required to net such activity across the same customer's accounts at that broker-dealer. This may miss some buy to cover trades that may occur if a Manager uses a broker to execute transactions and a prime broker (or prime brokers) to manage positions. In this case, the broker-dealer managing the purchase of shares would not necessarily know that the buy is actually a buy to cover and would thus not mark the trade as such. The current proposal may also miss transactions that may occur if a Manager uses multiple accounts at the same broker-dealer to trade.

2. Effects on Stock Price Efficiency

The Commission believes that the Proposals may have uncertain effects on stock price efficiency.[262] The uncertain effects on price efficiency come because increased transparency generally increases efficiency whereas increased transparency could also discourage investors from gathering information—which harms price efficiency. This section discusses both the concept of price efficiency and the positive and negative impacts that the Proposals may have on price efficiency.

The publicly released aggregated data from Proposed Form SHO would provide new information to market participants about the aggregate activities of some short sellers—with a planned lag of approximately fourteen days from the end of the filing deadline.[263] Existing short selling data, such as the FINRA short interest data, is timelier than the potential data from the Proposed Rule 13f–2 and Proposed Form SHO, and it includes short interest for all short sales known to clearing broker-dealers but does not provide the Commission or the public daily information about short sellers' activities.

There is likely significant overlap between the information about stock fundamentals contained in FINRA short interest data and in the data that would be aggregated from Proposed Form SHO filings. However, the information in Proposed Form SHO filings focuses on Managers and indicates whether positions are fully or partially hedged, and provides daily net changes in positions. Thus, the Proposed Rule 13f–2 and Proposed Form SHO would increase the information available to investors about bearish sentiment in the market. For example, the information on the proportion of short interest made up of Managers with substantial positions, how much of those positions are fully or partially hedged, and the activity information would allow market

[258] For example, one issuer, upon learning that short sellers had taken a large short position in the issuer, reportedly sent a letter to all shareholders urging them to request physical custody of their shares from their broker-dealers in an apparent attempt to disrupt securities lending which supports short selling. This strategy appeared to work initially as the share price increased by nearly 50% in the subsequent three weeks. The issuer also hired private investigators to determine who was behind the short selling and filed suit against a well-known short seller. The issuer, however, entered bankruptcy less than a year later. The bankruptcy courts ruled that the issuer defrauded investors. *See* G. Weiss, The Secret World of Short-Sellers, Business Week, 62a (August 5, 1996). *See also* Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms,* 2 (1) The Rev. of Asset Pricing Studies 1–30 (2012).

[259] Analysis of Form SH data found that short positions were held at or above the $10 million or 2.5% thresholds only for an average of 9.85 days after the end of each month. *See* note 80 (for information on the methodology and caveats of using Form SH data).

[260] *See infra* note 265 (for a discussion on the Commission's estimates on how long Managers hold short positions). *See also infra* note 269 (for more information on short sellers that do hold their positions for long periods of time).

[261] Due to imperfect information and market frictions, a short seller who ''does not have access to additional capital when security prices diverge . . . may be forced to prematurely unwind the position and incur a loss[.]'' *See, e.g.,* Mark Mitchell, Todd Pulvino, and Erik Stafford, *Limited Arbitrage in Equity Markets,* 57 (2) The J. of Fin. 551–584 (2002). *See also, e.g.,* Andrei Shleifer and Robert W. Vishny, *The Limits of Arbitrage,* 52 (1) The J. of Fin. 35–55 (1997) and Denis Gromb and Dimitri Vayanos, *Limits of Arbitrage,* 2 (1) Annu. Rev. Fin. Econ. 251–275 (2010) (citations therein).

[262] *See infra* Part VIII.E.1 (for additional discussion of the effect of the Proposals on efficiency).

[263] *See supra* Part III.C (for more information on the delay of public dissemination of Proposed Form SHO data).

participants an enhanced view of short interest and provide insight on changes in short interest between short interest reports. Further, the use of the last settlement day of the month as the reference month for the Proposed Form SHO reports would allow for a direct comparison of the Proposed Form SHO data to the FINRA short interest data. With FINRA short interest as a reference point, the activity data may then provide insight to market participants about changes in total short interest from FINRA short interest report to FINRA short interest report. For example, market participants could potentially use the data on positions' changes to correlate periods of significant increases or decreases in short positions with corporate events or announcements to gather a more precise view of how the market views corporate actions or events and which events contributed to the final short interest tally at the end of the month.

Increased information may increase price efficiency. As such, the proposed publication of the aggregated Proposed Form SHO data represents new information that market participants could use to value stocks—increasing stock price efficiency. Price efficiency (also known as market efficiency) refers to how accurately prices reflect available information relevant to the value of the asset.[264] For example, this information may allow market participants to more effectively make trading decisions and manage risk—increasing price efficiency. Although, the majority of Managers' short positions would be closed by the time the aggregated data from Proposed Form SHO would be made public due to the lag in reporting and public dissemination, a portion of the short positions would still be open.[265] While the market reacts to unexpected short interest changes,[266] the ability to understand short interest and short interest changes should be additive information that would be reflected in prices upon publication. However, the increase in price efficiency from the publication of aggregated Proposed Form SHO data is likely to be limited due to the delay in publication.

The Proposals may also improve price efficiency if they mitigate fraud as discussed in Part VIII.D.1. Fraud is inherently non-efficient trading and harms price efficiency because a fraudster's motive is to create a deviation of a firm's value from fundamentals and to profit from this deviation. Thus, to the extent that fraudulent trading, such as short and distort campaigns, are limited by regulator's access to the data provided by Proposed Form SHO, the Proposed Rule 13f–2 would result in improved price efficiency.

On the other hand, Proposed Rule 13f–2 may harm price efficiency by increasing the cost of short selling. Academic studies, both theoretical and empirical, have shown that when short selling becomes more costly, stock prices are less reflective of fundamental information both because costly short selling makes trading on information difficult, and because costly short selling dissuades investors from collecting information in the first place.[267]

Proposed Rule 13f–2 affects the value of short selling in four ways: Compliance costs, revealing short sellers' information, potentially revealing short sellers trading strategies, and increasing the threat of retaliation. First, the compliance costs associated with reporting large short positions are a direct increase in the cost of short selling.[268] As many Managers have underlying investors, these costs would likely be passed on to end consumers in the form of lower returns due to limiting the strategies that Managers could profitably employ.

Second, publicly releasing the aggregated Proposed Form SHO data has the potential to reveal some of the information that short sellers may have acquired through fundamental research. Revealing this information to the market may cause prices to adjust to the information that the short seller uncovered before the short seller is able to acquire their full desired position—decreasing the profits to acquiring the information and providing less incentive to produce fundamental research. Thus, the publication of Proposed Form SHO data represents an additional cost to short selling in the form of potentially lower profitability for trading on negative information. That the data is aggregated and released on a lag mitigates this cost somewhat but does not eliminate it. To avoid price impacts, a short seller seeking to build a sizeable position in a firm generally does so by building up small positions over time until the desired position is accumulated.[269] Because short positions can take a long time to accumulate even with a lag the information motivating the trades being reported may not be stale. While aggregation limits the precision with which markets can estimate an individual short seller's motivation, it does not eliminate it.[270] Additionally, the threshold may protect short sellers with smaller short positions from having the information in their trades revealed. In contrast, the Proposed Rule 13f–2 may highlight very large positions potentially increasing the likelihood that some of the information contained in the trades of large short sellers would be acted on by other market participants before the short seller could acquire their optimal position. Thus, the Commission expects that publication of aggregated Proposed Form SHO data would still represent a cost to short selling.[271] Relatedly, Managers who build short positions that exceed the threshold may choose to

[264] *See, e.g.,* Eugene Fama, *Efficient Capital Markets II,* 46(5) J. Fin. 1575–1617 (1991).

[265] The Commission estimates that the median number of days that the short position is held above the threshold after the end of the month is 0, while the average number of days that a short positon is held above the threshold is 9.85 (suggesting that the majority of positions will be closed. Some are held longer than the delay in reporting).

[266] *See, e.g.,* A. Senchack and L. Starks, *Short-Sale Restrictions and Market Reaction to Short-Interest Announcements,* J. of Fin. and Quantitative Analysis 177–194 (1993).

[267] *See, e.g., supra* note 242. *See* Dixon (2021). *See* Edward Miller, *Risk, Uncertainty, and Divergence of Opinion,* 32 (4) The J. of Fin. (1977). *See* Robert F. Stambaugh, Jianfeng Yu, and Yu Yuan, *The Short of It: Investor Sentiment and Anomalies,* 104 (2) J. of Fin. Econ. 288–302 (2012).

[268] *See infra* Part VIII.E.2 (for a discussion of how these direct costs may affect investors in funds that employ short selling).

[269] *See* Albert S. Kyle, *Continuous Auctions and Insider Trading,* Econometrica: J. of the Econometric Society 1315–1335 (1985). *See* Kirilenko, Andrei, Albert S. Kyle, Mehrdad Samadi, and Tugkan Tuzun, *The Flash Crash: High-Frequency Trading in an Electronic Market,* 72 (3) The J. of Fin. 967–998 (2017) (for a discussion of this type of trading); Amir E. Khandani and Andrew W. Lo., *What Happened to the Quants in August 2007? Evidence from Factors and Transactions Data,* 14 (1) J. of Fin. Markets, 1–46 (2011) (for a discussion of what happens when investors build large positions without properly smoothing their trading). Well-known short seller Gabe Plotkin testified that his firm had built and maintained a short position in GameStop for over 5 years prior to the significant volatility experienced in January 2021. *See* Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide (Hearing), *U.S. House of Representatives Committee Repository* (''Game Stopped Hearing''), *available at https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=111207; See also* Juliet Chung and Melvin Capital Says It Was Short GameStop Since 2014, *Wall Street Journal* (Feb 17, 2021). In the Form SH data, 25% of positions were held above the proposed Threshold A for at least a month. *See supra* note 80.

[270] *See supra* Part VIII.D.1 (for a discussion of how market participants may be able to uncover individual identities).

[271] Consistent with this expectation, research on similar regulations in Europe has documented a similar effect there. *See* Market Impact of Short Sale Position Disclosures, *Copenhagen Economics: Office of Global Research and Markets at the MFA, available at https://www.copenhageneconomics.com/publications/publication/market-impact-of-short-sale-position-disclosures.*

execute the positions that are beyond the threshold at a pace that is faster than what they would have done otherwise to attempt to build their optimal position before information is disclosed and copy-cat investors are able to trade based on the reported data. Executing transactions at a faster speed than would be optimal imposes increased transaction costs on Managers than they would have incurred otherwise.[272] Additionally, trading faster than is optimal may harm price efficiency by leading prices to over-react to the aggressive trading.[273]

Third, the Proposed Form SHO data may provide information about the specific trading strategies of certain short sellers. For example, in the case where there is only one filer and market participants know this, then market participants could attempt to use the activity data to extract information about the specific trading strategies that short sellers use to implement their trades. Market participants could then try to identify similar patterns in the live data and alter their trading strategies to attempt to profit from any predictability in the short seller's trading strategy. This behavior would further limit the benefit to short selling as it may allow other market participants to game the short seller's trading behavior—increasing the cost of implementing short selling trading strategies. While the Commission acknowledges this risk, it believes that the proposed design of the published activity data would significantly limit this risk. In particular, the proposed netting of short selling activity across increases and decreases in short position along with showing only one number per day per security would mask much of the trading behavior of individual short sellers while still providing information about changes in bearish sentiment in the market. For example, Managers may build or reduce a short position using complex trading strategies potentially involving transactions on both sides of the market. By netting trading activity and aggregating across Form SHO filers, market participants viewing the publicly reported Form SHO data would still get a view of changes in bearish sentiment while keeping Manager specific trading strategies hidden.

The public disclosure requirements may also expose Managers to retaliation by other market participants.[274] Although aggregating the data before releasing it to the public on a delay would provide some protection to Managers from having their identities uncovered, in certain cases motivated market participants may still be able to identify individual investors. For instance, in the case that the aggregated short position reported to the public is just above the threshold, one could reasonably assume that only one Manager has a short position large enough to report, which may facilitate identifying who that manager is. The Commission believes that even if the probability of identifying individual short sellers is low, the threat of this additional exposure to retaliation may disincentivize short selling. However, the Commission believes that on balance aggregating the data prior to publishing it provides appropriate protection of short sellers' identities and trading strategies.

If specific Managers are identified, issuers might take retaliatory action against individual short sellers through lawsuits and by forwarding information to regulators in attempts to precipitate regulatory investigations, through claims in the media, or by applying pressure on the shorting firm through business relationships that may exist outside of trading.[275] There is also evidence that when short sellers' positions become public, market participants strive to orchestrate short squeezes and are successful a significant fraction of the time.[276] Short sellers often face lawsuits when they take their information public or their identities otherwise become known—regardless of whether the information the short sellers brought forth was legitimate.[277] Some issuers have even been known to hire private investigators in an attempt to uncover the identities of individuals short selling their stock.[278] Some short sellers have also expressed that they have experienced threats to their personal safety after their short positions were revealed.[279]

Lastly, even if the identities of the individuals reporting short selling data remain unknown, publicly disclosing that Managers have amassed large aggregate short positions may expose the Managers to increased risk of being the target of predatory strategies such as short squeezes. The risk of short squeeze increases if market participants are able to identify the individuals with large short positions as discussed in Part VIII.D.1. In this case they may be able to better estimate the capital constraints of the short seller to identify the likelihood of a squeeze being successful.

Because reporting information on Proposed Form SHO increases the costs of short selling, it is possible that short sellers may strategically select short positions to have an average short position just below the threshold that requires reporting. However, the risk of this is mitigated by the way in which the threshold is constructed, which could make trading around the threshold more costly. For example, because the threshold is not based on the position at the end of the month, Managers would not be able to simply reduce their positions at the end of the month to avoid reporting. Instead, Managers would need to maintain a position below the Reporting Thresholds throughout the month to avoid reporting. The size of a short position is often related to the expected magnitude of the short seller's negative information with revelations of larger negative information being associated with larger short positions.[280] Consequently, to the extent that Managers may choose to select otherwise sub-optimal short positions to avoid reaching the reporting threshold, Proposed Rule 13f–2 and Proposed Form SHO could result in a sub-optimal allocation of capital and may harm price efficiency. To this end some have argued that stock prices can be viewed as a weighted average of investor sentiment, if short sellers limit their positions to avoid disclosure requirements, then stock prices may skew towards being overvalued.[281]

[272] *See supra* note 269; *see also* Kyle (1985).

[273] *See, e.g.,* Albert S. Kyle and Anna A. Obizhaeva, Large Bets and Stock Market Crashes (March 22, 2019), *available at https://ssrn.com/abstract=2023776* or *https://dx.doi.org/10.2139/ssrn.2023776.*

[274] *See* 2011 MFA Letter, *supra* note 49; Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms,* 2(1) The Rev. of Asset Pricing Studies 1–30 (2012); Lorien Stice-Lawrence, Yu Ting Wong, Yu Ting Forester Wong, and Wuyang Zhao, Short Squeezes After Short-Selling Attacks (November 2021), *available at https://ssrn.com/abstract=3849581* or *http://dx.doi.org/10.2139/ssrn.3849581.*

[275] *See* 2011 letter from Security Traders Association of New York on the Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2), *available at https://www.sec.gov/comments/4-627/4627-155.pdf.*

[276] *See supra* note 274, Stice-Lawrence, Wong, and Zhao (2021) and Lamont (2021).

[277] *See* Owen A. Lamont, *Go Down Fighting: Short Sellers vs. Firms,* 2 (1) The Rev. of Asset Pricing Studies 1–30 (2012).

[278] *Id.*

[279] *See* Lamont (2012) *supra* note 258; Game Stopped Hearing, *supra* note 269 (CEO of Melvin Capital LP stated that after his short positions were made known, Reddit users made posts and sent personal text messages that were laced with anti-Semitic slurs and threats of physical harm to him and others.).

[280] *See, e.g., supra* note 269; Kyle (1985).

[281] *See, e.g., supra* note 267, Miller (1977); Letters on the Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2) from Investment Company Institute (hereafter ''ICI Letter'') *available at https://www.sec.gov/comments/4-627/4627-*

Continued

For these reasons, the Commission believes that the Proposals may increase the costs of short selling and potentially dissuade investors from engaging in fundamental research and the total amount of short selling may decrease, though the Commission has designed the Proposals to mitigate these risks. To the extent that fundamental research decreases, price efficiency could be harmed as prices would not necessarily reflect all available relevant information, only that portion that had been discovered by investors performing fundamental research. Additionally, Proposed Rule 13f–2 could dissuade options market makers from holding large short positions and providing liquidity in options markets and, thus, could harm price efficiency in equity markets.[282]

As with the discussion in Part VIII.D.1, many of the economic effects articulated in this section relating to the reporting of Proposed Form SHO could be limited to the extent that the data reported in Proposed Form SHO contains factual errors. The EDGAR system would check the data for technical errors, however the accuracy of the data is dependent on accurate and complete data entry by filers. Thus, the data reported in Proposed Form SHO could contain errors. To the extent that these errors exist and meaningfully affect the usability of the data, the value of the data and the economic benefits and costs associated with collecting the data would be limited. Additionally, the benefits and costs are lessened by the proposed delay in the publication of the data. Furthermore, the proposed data would only be available for those securities with Managers who have short positions over the threshold, which in some cases may not be representative of all short positions, and the number of reporting Managers may change from month to month.

3. Effect on Market Liquidity

The effect of the Proposals on liquidity is uncertain. Part V.4.ii, discusses the possibility that Proposed Rule 13f–2 and Proposed Form SHO may harm price efficiency by dissuading investors from pursuing fundamental research and that Proposed Rule 13f–2 and Proposed Form SHO along with Proposed Rule 205 and the Proposal to Amend CAT may help price efficiency by increasing transparency with respect to the actions of large short sellers. To the extent that the Proposals improve price efficiency, this could also indirectly improve liquidity because market makers would be subject to less mispricing risk. However to the extent that Proposed Rule 13f–2 and Proposed Form SHO harm price efficiency, the opposite may be true. Mispricing risk leads to lower liquidity because market makers must be compensated, in the form of wider bid ask spreads, for the potential that there is information relevant to the firm that has not yet been discovered and may affect prices. Thus if the rule harms price efficiency it may also harm liquidity. The opposite is also true. To the extent that the Proposals enhance market efficiency they may also enhance liquidity by mitigating mispricing risk.

Additionally, in the event that an options market maker might have a short position close to the Reporting Thresholds, the Proposed Rule 13f–2 could dissuade the option market maker from increasing their short position, which may harm their willingness to provide liquidity in options markets. Alternatively, Proposed Rule 13f–2 might not result in option market makers who exceed the Reporting Thresholds changing their positons, in which case the costs of filing Form 13f–2 (and other compliance costs) could result in wider spreads if the compliance costs are large enough.

4. Effect on Corporate Decision Making

The Commission believes that Proposed Rule 13f–2 and Proposed Form SHO could have mixed effects on corporate decision making. On the one hand, research suggests that corporate managers learn from market reactions to announcements.[283] Consequently, Proposed Rule 13f–2 and Proposed Form SHO may provide corporate managers with additional feedback on their decisions. For instance, projects often take some time to design and implement after announcement, consequently, even with the lag in the reporting time for the Proposed Form SHO data, a corporate manager could review the data around significant announcements to better understand how the market may view a particular project or announcement. If large short positions are built shortly after a corporate announcement, then this may give the signal to corporate management that the market views that announcement negatively which may help a manager modify or reverse poor decisions. From this perspective the Proposals may enhance corporate manager decision making.

In contrast, short sellers, and particularly large short sellers with the resources to perform fundamental research, serve as valuable external monitors of management. If a corporate manager knows that short sellers are monitoring their actions and financial statements and are willing to expose wrong-doing, then they are less likely to engage in fraud or do other things that may hurt the value of the company. Historically, short sellers have, through doing research, uncovered fraudulent behavior.[284] Academic research has also shown that even the threat of short

141.pdf; Data Explorers Letter; SIFMA Letter *available at https://www.sec.gov/comments/4-627/4627-143.pdf* (about transaction marking leading to less short selling). In contrast, some argue that short selling itself increases the value of assets as it provides demand for securities lending and allows owners to collect securities lending fees. From this perspective, restricting short selling may decrease stock prices by restricting the demand for securities loans. *See* Darrell Duffie, Nicolae Garleanu, and Lasse Heje Pedersen, *Securities Lending, Shorting, and Pricing,* 66 (2–3) J. of Fin. Econ. 307–339 (2002). The Commission does not believe that this effect is the predominate effect of short selling on asset prices, because the average fee earned from securities lending is usually very small relative to the average long term stock returns. Thus, it appears that other economic effects tend to dominate the relationship between short selling and stock prices and that on net short selling restrictions lead to stock overvaluation. *See also* OTC Markets, Provable Markets, SIFMA, and Chester Spatt letters (responding to FINRA's regulatory notice 21–19 arguing that short selling is vital to price efficiency), *available at https://www.finra.org/rules-guidance/notices/21-19#*. In contrast, others have argued that absent disagreement, costly short selling can help correct over-pricing by preventing the uninformed (but not informed traders) from transacting. This skews the distribution of traders in the market towards being more informed meaning that markets learn more from each trade and prices adjust more quickly when uninformed traders do not trade. *See* Douglas Diamond and Robert E. Verrecchia, Constraints On Short-Selling And Asset Price Adjustment To Private Information, 18 (2) J. of Fin. Econ. 277–311 (1987).

[282] *See infra* Part VIII.D.3. Research has found a that options play an important informational role in stock price discovery, therefore reductions in liquidity in the options market can reduce the price efficiency in the equity market. *See also* David Easley, Maureen O'hara, and Pulle Subrahmanya Srinivas, *Option Volume and Stock Prices: Evidence on Where Informed Traders Trade,* 52 (2), THE JOURNAL OF FINANCE 431–465 (1998).

[283] *See, e.g.,* James B. Kau, James S. Linck, and Paul H. Rubin, *Do Managers Listen to the Market?,* 14 (4) J. of Corporate Fin. 347–362 (2008).

[284] *See, e.g.,* A. Dyck, A. Morse, and L. Zingales, *Who Blows the Whistle on Corporate Fraud?,* 65(6) The J. of Fin. 2213–2253 (2010) (using a large sample of fraud cases between 1996 and 2004, the authors find that short sellers uncovered the fraud in nearly 15% of cases.). *See also* Cassell Bryan-Low and Suzanne McGee, *Enron Short Seller Detected Red Flags in Regulatory Filings,* The Wall Street J. (Nov. 5, 2001) (discussing an Enron short seller that detected red flags reviewing, among other things, the company's SEC filings), *available at https://www.wsj.com/articles/SB1004916006978550640,* retrieved from Factiva database. *Cf.* Nessim Mezrahi, Stephen Sigrist, and Carolina Doherty, More Securities Class Actions May Rely on Short-Seller Data, Portfolio Media (January 10, 2022) (authors' ''analysis of 131 Rule 10b–5 securities class actions indicates that plaintiffs continue to rely on short-seller research to substantiate fraud-on-the-market claims.''), *available at https://www.law360.com/articles/1453499/more-securities-class-actions-may-rely-on-short-seller-data.*

selling serves to discipline managers.[285] As discussed in Parts V.4.i and V.4.ii, Proposed Rule 13f–2 may discourage Managers from performing fundamental research. If less fundamental research is performed by short sellers, then their role as monitors of the firm diminishes. Less monitoring could lead to higher incidences of fraud as managers feel that the likelihood of being caught goes down.[286] Thus, to the extent that Proposed Rule 13f–2 and Proposed Form SHO discourage fundamental research it may lead to both an increase in the total amount of corporate fraud in the economy as well as decrease the fraction of frauds that are discovered by investors.

5. Effect of Certain Electronic Filing and Dissemination Requirements

Proposed Rule 13f–2 and Proposed Form SHO would require the short position and activity disclosures to be filed on the Commission's EDGAR system using a structured, machine-readable data language. In particular, the rule and Form would require Proposed Form SHO to be filed on EDGAR in a custom XML-based data language specific to that Form (''custom XML,'' here ''Proposed Form SHO-specific XML''). The XML Schema for Proposed Form SHO-specific XML would incorporate validations of certain data fields on the Form to help ensure consistent formatting and completeness.[287] While the field validations would act as an automated form completeness check when a Manager files a Proposed Form SHO, the field validations would not be designed to verify the accuracy of the information filed in Proposed Form SHO filings. EDGAR would subsequently aggregate the reported information at the equity security level and release the aggregated data to the public, either on EDGAR or on the Commission's website.

The Commission believes these requirements would incrementally augment the various effects of the short position and activity disclosures discussed herein by enhancing the accessibility, usability, and quality of the Proposed Form SHO disclosures (for use by the Commission) and the aggregate security-level disclosures (for use by the public). By requiring a structured machine-readable data language and a centralized filing location (EDGAR) for the disclosures on Proposed Form SHO, the Commission would be able to access and download large volumes of Proposed Form SHO disclosures in an efficient manner.

Similarly, the provision of the aggregated security-level information at a centralized, publicly accessible location in a structured, machine-readable data language, would enable investors and other public data users to download the aggregated information directly, and the data could then be analyzed using various tools and applications. If the security-level information were not available at a centralized location in a structured, machine-readable language, data users seeking to analyze the information using tools and applications would need to search for, extract, and structure the security-level short position and activity information, or pay a third-party vendor to do so.

The Commission believes requiring the short position and activity disclosures to be filed in Proposed Form SHO-specific XML would facilitate more thorough review and analysis of the reported short sale disclosures by the Commission, which would increase the efficiency and effectiveness with which the Commission could identify manipulative short selling strategies—which may also serve as a deterrent to would be manipulators and thus may help prevent manipulation—and observe systemic risk. The Commission believes that this outcome would benefit investors by facilitating the Commission's observation of short selling and would thus help protect investors and ensure the sufficiency of information related to short selling in the market.

The proposed requirement for short sale disclosures to be filed on EDGAR in Proposed Form SHO-specific XML would result in additional incremental compliance costs on filing Managers. These direct compliance costs are detailed in a subsequent section.[288] Moreover, to the extent these incremental compliance costs further chill the incidence of short-selling, the EDGAR and Proposed Form SHO-specific XML requirements would increase the likelihood of the indirect costs that are discussed elsewhere in this section.

6. Effect on the Securities Lending Market

As discussed in parts V.4.i and V.4 ii, the Proposals would increase the cost of short selling, particularly large short positions—potentially leading to less overall short selling. As discussed in Part V.3.i, short sellers must borrow shares to open a short position. When investors borrow shares they pay a borrowing fee to the owner of the share. These fees can represent a significant source of revenue for pension funds, mutual funds, and others who engage in securities lending.[289] Consequently, to the extent that the Proposals discourage short selling they may also lower overall portfolio returns, including for institutional investors that engage in securities lending.[290]

7. Direct Compliance Costs

The Commission believes that there would be direct costs associated with Proposed Rule 13f–2, Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT. These costs include: Managers reporting position and activity data; broker-dealers updating CAT reporting processes; amendments to Regulation SHO; and the Commission processing and releasing the Manager reports through EDGAR.

The Commission's estimates for Managers' collective direct compliance costs to capture and report the information required for Proposed Form SHO range from $54,083,087 to $156,309,500. This range reflects estimates for the number of managers that would be subject to the rule's reporting requirement, their data capture costs, and their reporting costs. The Commission estimates that between 346 and 1,000 managers would be required to file Proposed Form SHO. We based our lower estimate on the number of Form SH filers above Threshold A. The actual number of reporting Managers would likely be higher than

[285] *See, e.g.,* Massimo Massa, Bohui Zhang and Hong Zhang, *The Invisible Hand of Short Selling: Does Short Selling Discipline Earnings Management?* 28 (6) The Rev. of Fin. Studies 1701–1736 (2015).

[286] *See, e.g.,* Paul Povel, Rajdeep Singh, and Andrew Winton, *Booms, Busts, and Fraud,* 20 (4) The Rev. of Fin. Studies 1219–1254 (2007) (linking variations in monitoring intensity to the incidence rate of financial fraud.).

[287] *See supra* Part III.B.4. Field validations are restrictions placed on each data element which would not allow a filer to file a form if there are certain technical errors in critical fields. If a Proposed Form SHO were to include, for example, letters instead of numbers in a field requiring only numbers, it would be flagged as a technical error, at which point the filer would either be unable to file the Form (if completed using the fillable web form provided by EDGAR) or the filing would be rejected (if directly filed in EDGAR in Proposed Form SHO-specific XML). To complete the filing, the filer would need to correct the error and re-file.

[288] *See infra* Part VIII.D.7.

[289] *See supra* note 232.

[290] Commenters on the Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2) argue that increased public short selling disclosure may result in reduced short selling, thereby lowering revenues to institutions that maintain long positions in equities for extended periods (such as pension funds). *See, e.g.,* 2011 Letter from Alternative Investment Management Association, *available at https://www.sec.gov/comments/4-627/4627-138.pdf.*

our low estimate, because Managers that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of less than $100 million were not required to file Form SH,[291] and lower than our high estimate.[292] Based on this estimated range, the Commission estimates that the collective cost for updating systems to capture the required information would be between $36,017,735 and $104,097,500[293] and the annual total cost for reporting managers would be between $18,065,352 and $52,212,000.[294] Costs could be underestimated to the extent that wages are higher than those used in the estimation. The initial costs are likely higher than the lower bound estimates as Managers who may not file Proposed Form SHO on a monthly basis would still incur the initial costs. Furthermore, because Manager short positions are fluid, some Managers would not be required to file a report every month when they fall below the reporting threshold. As a result of this fluidity, ongoing costs could be lower than our estimates. Moreover, to the extent that the number of reportable short positions varies across Managers, the costs to track and report those positions would also vary by Manager. And initial costs could also be higher for some Managers who do not currently report to EDGAR.

The Commission believes that there could be costs in addition to the previously stated costs. The Commission estimates that filing amendments to Proposed Form SHO may take as long to file as the initial filing, therefore Managers could also incur additional costs up to $4,351 to file amendments to Proposed Form SHO.[295] These costs may be more common for Managers who do not hold short positions often and are likely to decrease with time as Managers become more experienced with filing Proposed Form SHO. As part of the filing of Proposed Form SHO, Managers would need to ensure that there is not duplicative reporting.[296] The burden to ensure that there is not duplicative reporting would likely vary by Manager, as larger Managers with multiple accounts may be more likely to have duplication issues. As part of updating systems to comply with the reporting requirements of Proposed Rule 13f–2, Managers must calculate the market value of the trade using the official closing price as of the close of regular trading hours for the trade settlement date in question, which may not be the fair market value at the time in which the trade occurred.[297] However, the Commission believes that in most cases this would be a small burden on Managers as the data needed for the calculation would be publicly available and the Commission believes that Managers may already track the end of day fair market value of short sales. Even in cases that the reportable equity security is not traded on an exchange, the Commission believes that Managers may be able to calculate the value of their short positions by using publicly available closing prices from the OTC Reporting Facility. In circumstances where closing prices of non-reporting company issuers are not available, the Commission believes the tracking such information would still not impose a large burden as a Manager can use the price at which they last purchased or sold any share of that security, which would be readily available to the Manager.

The Commission also believes that there would be costs associated with tracking short positions in relation to the threshold.[298] Particularly, Managers must track their average short positions over the month to be aware if the maximum position exceeds $10 million as well as if it exceeds the 2.5% threshold, or in the case of equity securities of a non-reporting company issuer, if it exceeds the $500,000 threshold. However, the Commission believes that the proposed Reporting Thresholds would generally lower the burden on Managers as fewer Managers would be required to report than if the Commission did not propose a reporting threshold. For example, the Commission believes that certain types of Managers would not meet a Reporting Threshold.[299] However, the Commission believes that the costs associated with Proposed Rule 13f–2 and Proposed Form SHO would not be dependent on the type of Manager, with the exception that Managers who do not currently report to EDGAR may have increased costs associated with complying with Rule 13f–2. Additionally, certain types of Managers may be less likely to trigger the threshold, resulting in lower overall costs for these Managers. Using Form SH data, the Commission estimates that an average of 442 Managers would have been required to file Proposed Form SHO each month under the threshold in place during temporary rule 10a–3T. However, only 346 Managers would be required to file under the proposed Threshold A.[300]

The Commission understands that the cost of tracking short positions could be higher for certain types of securities. For example, tracking the short position in an exchange traded fund as a percent of shares outstanding would be more difficult as the number of shares outstanding changes frequently. Additionally, Managers who hold short positions in non-reporting company issuers may have difficulty calculating the value of their position, however Managers may use the last price at which a the Manager traded even though the price may be stale. The Commission also believes that the cost to track and report activities information may vary across activity categories. Short selling and buy to cover activities would likely be the most common forms of reported activities and would therefore account for the majority of the costs. However, other categories of reportable activity, such as option exercises and assignments, tender conversions, and seasoned market purchases that reduce or close a short position would be reported less frequently and may require more attention to file as Managers would have less experience with reporting such activities.

Requiring Proposed Form SHO to be filed on EDGAR in Proposed Form SHO-specific XML would not impose

[291] *See* Table I. *See also* note 80 (for more information on the methodology and caveats of using Form SH data).

[292] *Disclosure of Short Sales and Short Positions by Institutional Investment Managers,* 73 FR at 61686. (This estimate is similar to the estimate provided). Proposed Form SHO filers filed weekly reports. As a result, each reporting manager would file fewer reports because Form SH would be filed monthly. *See supra* note 124 (for more information on 1,000 Managers was estimated). However, fewer Managers actually filed Form SH.

[293] *See supra* PRA Table 2 and note 133. The lower range was calculated using 346 Managers. 20 hours per submission × 346 submissions by Managers each month × 12 months × $217.55 = $18,065,352. The Commission estimates that 346 Managers would have been required to file Form SH had Form SH be subject to the same $10 million and 2.5% threshold.

[294] *See supra* PRA Table 1 and note 143. The lower range was calculated using 346 Managers.

[295] Depending on what amendments are needed the Commission believes that each amendment could take up to the original 20 hours to complete, at a cost of $217.55 per hour = $4,351. *Id. See also* Form SHO, Special Instructions at 4.

[296] *See* Form SHO, Special Instructions at 6.

[297] *See* Form SHO, Special Instructions at 7. *See also* PRA Table 2 in Part VI (for an estimate of these burden hours).

[298] Based on the number of registered investment companies reporting short positions and the number of hedge funds engaged in a strategy including short selling, we preliminary believe that only a small fraction of Managers would be likely to have monitoring responsibilities pursuant to the proposed rule and, given the proposed reporting thresholds, an even smaller fraction would be likely to have reporting obligations.

[299] *See supra* Section VIII.C.2 and *supra* note 185 (for a discussion on why certain types of managers are more likely to have reporting requirements).

[300] *See supra* Table I. *See also supra* note 77 (for more information on Form SH data).

significant incremental costs on Managers. We expect most Managers who would be required to file Proposed Form SHO would likely have experience filing EDGAR forms that use similar EDGAR Form-specific XML data languages, such as Form 13F. In that regard, we note the process for filing Proposed Form SHO, as well as the XML-based data language used for Proposed Form SHO, would be similar to the filing process and data language used for Form 13F.[301] We expect that Managers with such experience that choose to file Proposed Form SHO directly in Proposed Form SHO-specific XML would incur some compliance costs associated with doing so.[302]

In addition, Managers would be given the alternate option of filing Proposed Form SHO using a fillable web form that would render into Proposed Form SHO-specific XML in EDGAR, rather than filing directly in Proposed Form SHO-specific XML using the technical specifications published on the Commission's website. We expect Managers who do not have experience filing Form 13F or other EDGAR Form-specific XML filings would likely choose this option. In that regard, we note that Managers (*i.e.,* certain ''institutional investment managers'' as defined by Section 13(f)(6)(A) of the Exchange Act, which may include entities such as investment advisers, banks, insurance companies, broker-dealers, corporations, and pension funds) are only required to file Form 13F if they exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million.[303] Of Managers that do not have experience filing Form 13F, only a subset are subject to other EDGAR Form-specific XML filing requirements.[304] For any Managers that choose to file Proposed Form SHO using a fillable web form, whether or not they have prior experience with filing forms in EDGAR Form-specific XML, we do not believe the Proposed Form SHO-specific XML requirement (*i.e.,* the requirement to place the collected information in a fillable web form provided by EDGAR, rather than in an HTML or ASCII document to be filed on EDGAR as is required for most other EDGAR forms) would impose any additional compliance costs.[305]

The Commission is cognizant of the burdens Managers experienced of submitting Form SH in compliance with temporary Rule 10a–3T and has designed Proposed Rule 13f–2 and Proposed Form SHO to attempt to reduce those burdens. First, commenters on the temporary Rule 10a–3T stated that the 0.25% threshold was too low.[306] The two-pronged threshold in Proposed Rule 13f–2 is higher than the threshold in Rule 10a–3T, reducing the number of Managers likely to have a reporting obligation. For example, the Commission estimates that only 41% of positions reported under Rule 10a–3T would be required to report given the higher threshold in Proposed Rule 13f–2 and Proposed Form SHO, while still collecting 89% of the dollar value.[307] Additionally the proposed threshold could be less burdensome to assess than the one in Rule 10a–3T because it requires the Manager to assess whether it is above the threshold on a monthly basis rather than on each individual day. Second, many commenters believed that weekly reporting was overly burdensome.[308] The short selling information required by Proposed Rule 13f–2 and Proposed Form SHO would be reported less frequently (monthly rather than weekly) and would involve reporting end of month positions rather than daily positions. Third, Managers would have more time to compile and file the Proposed Form SHO reports than they had to compile Form SH.

Notwithstanding these cost-reducing differences, the Commission does recognize that other differences could offset some or all of these cost reductions. In particular, Proposed Rule 13f–2 and Proposed Form SHO would require reporting additional information such as information on buy-to-cover activity and other activity that changes short positions. In addition, Proposed Rule 13f–2 and Proposed Form SHO would require that the information on activity include daily records and not be subject to its own threshold.[309] Also, unlike the Form SH required under Rule 10a–3T, the Proposed Form SHO that would be required by Proposed Rule 13f–2 would feature an XML Schema that would incorporate technical validations of certain data fields on the Form, and would flag technical errors and require the filer to correct the technical errors before successful submission on EDGAR. However, because the field validations contemplated by Proposed Rule 13f–2 and Proposed Form SHO would be limited to technical errors (*e.g.,* letters

[301] *See* EDGAR Filer Manual (Volume II) version 60 (December 2021), at 9–1 (''EDGAR Filer Manual Volume II'') (describing process for submitting Form-specific XML filings directly to EDGAR); see also Form 13F XML Technical Specification, *available at https://www.sec.gov/edgar/filer-information/current-edgar-technical-specifications.*

[302] *See supra* PRA Table 2 (estimating the ongoing burden for the Proposed Form SHO-specific XML requirement at two hours per Manager per filing and two hours per amended filing). Assuming 1,000 Managers filing 12 filings per year would equal 12,000 filings per year, resulting in 24,000 total annual industry burden hours (12 filings × 1,000 Managers × 2 hours = 24,000) and $6,480,000 in industry costs for filings per year (24,000 hours * $270 per hour for a programmer = $6,480,000) attributable to the Proposed Form SHO-specific XML requirement. In addition, based on an estimate of 420 amended filings per year, the total industry cost for the Proposed Form SHO-specific XML would be $226,800 for amended filings (420 amended filings × 2 hours per amended filing × $270 per hour = $226,800). As such, the total annual industry cost attributable to the Proposed Form SHO-specific XML requirement (including amended filings) is $6,706,800 ($6,480,000 for filings + $226,800 for amended filings = $6,706,800).

[303] *See* 17 CFR 240.13f–1(a).

[304] For example, registered brokers or dealers that are subject to the reporting requirements set forth in 17 CFR 240.17h–2T must file Form 17H either electronically or in paper. Those that choose to file electronically must file Form 17H partially in EDGAR Form-specific XML. Insurance companies may offer variable contracts that are registered under the Investment Company Act of 1940, and would thus be required to file annual reports on Form N–CEN in EDGAR Form-specific XML as well as, in some cases, monthly portfolio information on Form N–PORT in EDGAR Form-specific XML. Corporations may make exempt offerings and be required to file Form 1–A, Form C, or Form D in EDGAR Form-specific XML either in part or in full, depending on the nature of the offering.

[305] *See* 17 CFR 232.101(a)(1)(iv); 17 CFR 232.301; EDGAR Filer Manual Volume II at 5–1 (requiring EDGAR filers generally to use ASCII or HTML for their filed documents, subject to certain exceptions).

[306] *See* Temporary Rule 10a3–T Comment letters (including Seward & Kissel LLP Letter), *available at https://www.sec.gov/comments/s7-31-08/s73108-43.pdf;* MFA Letter, *available at https://www.sec.gov/comments/s7-31-08/s73108-41.pdf;* IAA Letter, *available at https://www.sec.gov/comments/s7-31-08/s73108-38.pdf;* ICI Letter, *available at https://www.sec.gov/comments/s7-31-08/s73108-47.pdf;* SIFMA Letter, *available at https://www.sec.gov/comments/s7-31-08/s73108-52.pdf. See also supra* Part III.D.2. (for more information on Threshold A using Form SH data).

[307] *See supra* Table I: Various Threshold Levels for Monthly Average Positions and Monthly Maximum Dollar Value. However, the Commission recognizes that Temporary Rule 10a–3T was in effect in 2008–2009 and the market may be different, particularly the average short position may be larger. Only Managers that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value of at least $100 million were required to file Form SH. Additionally, the data lacked data validation according to the needs of end user when filed making the data hard to work with.

[308] *See supra* note 306 (the comment letters in note, as well Coalition of Private Investment Companies letter), *available at https://www.sec.gov/comments/s7-31-08/s73108-46.pdf.*

[309] Rule 10a–3T required Managers to report beginning and end of day Short Position, Number of Securities Sold Short each day if the particular data item exceeded the threshold. *See* P 3 Final rule 10a–3T, *available at https://www.sec.gov/rules/final/2008/34-58785fr.pdf.* However, in analysis of Form SH data intraday short selling volume could not be examined for Form SH because the data field for ''Number of Securities Sold Short'' was populated in only 7% of observations after filters were applied. *See supra* note 80 for more information on short volume in Form SH data.

instead of numbers in a field requiring only numbers) that we believe would be straightforward to resolve, we do not believe such resubmission costs would be significant. Finally, the rule could impose costs on Managers who were not required to report Form SH because Rule 10a–3T and Form SH did not apply to Managers that exercise investment discretion with respect to accounts holding Section 13(f) securities with an aggregate fair market value of less than $100 million.

In connection with Proposed Rule 205, the Commission estimates that broker-dealers would have an initial technology cost to update order marking systems of $170,000 for each of the 1,218 broker-dealers with a total maximum initial cost to all broker-dealers of $207,060,000. This estimate likely significantly overstates the actual costs as many broker-dealers use third party order management systems.[310] In this case the operator of the third party order manager system would update their system and then apply it to all customers reducing the cost significantly. The Commission estimates that all but 126 of the broker-dealers use third party order management systems. In this case the direct compliance costs for these 126 broker-dealers would be $12,420,000. The remaining broker-dealers would likely incur costs in the form of higher fees from the third party order management firms to account for their additional costs. However, these would be significantly lower than the costs to adjust a system from scratch as the costs would be divided among all clients of the third party order management firm. Additionally, the Commission believes that that some broker-dealers already track their customer's buy to cover orders. Therefore, the initial cost from the rule are likely to be lower than the upper bound estimate.

Additionally, the Commission estimates an upper bound that each instance of marking an order ''buy to cover'' would take approximately 0.5 seconds, assuming that this takes as long as a short sale mark took in 2003, which would lead to an ongoing annual burden of 7,107 hours per broker-dealer and a total burden of 8,652,750 hours.[311] This figure is likely an overestimate in light of technological advancements since 2003. Therefore, the Commission estimates a lower bound for this burden of 721,000 hours or 592 hours per broker-dealer, assuming that computing speed has increased by at least 12 times since 2007.[312] Further, to the extent that some broker-dealers already track their customer's buy to cover orders, the on-going costs of this requirement would be low.

The 25 Plan Participants would face costs associated with the Proposal to Amend CAT, as they would be required to engage the Plan Processor to modify the Central Repository to accept and process new short sale data elements on order receipt and origination reports. Additionally the Commission estimates an external cost of $3,904 per participant or $101,520 total to compensate the Plan Processor for staff time required to make the initial necessary programming and systems changes.[313] However, these initial costs could be higher if the Commission underestimated the time and wages necessary for programming and systems changes for the plan processor to accept and process new data elements. Furthermore, the Commission believes that Proposal to Amend CAT would not impose additional ongoing cost to participants beyond those costs already accounted for in existing Paperwork Reduction Act estimates that apply for Rule 613 and the CAT NMS Plan approval order.[314]

The Commission believes that the proposed Proposal to Amend CAT would impose a one-time cost to Industry Members.[315] These costs would depend on whether implementing Proposed rules 6.4(d)(ii)(D) and (E) would involve creating additional fields in the order origination report, or if it is implemented within existing fields.

The Commission recognizes that costs would vary broadly across Industry Members, particularly depending on whether the Industry Member outsources the provision of an order handling system and regulatory data reporting to a service provider. In the CAT NMS Plan Approval Order,[316] the Commission identified 126 Industry Members that do not outsource these activities. For these Industry Members, implementation is likely to require changes both to their order handling systems as well as their regulatory data reporting systems that produce their CAT reporting data. The Commission estimates that the 126 insourcing Industry members would incur an aggregate one-time cost of $1,890,000 or $15,000 individually to update software and hardware to facilitate reporting the new buy to cover elements to CAT.[317] Additionally, 60 insourcing Industry members would incur an aggregate cost of $900,000 or $15,000 individually to update systems to facilitate reporting the new bona fide market making exception elements to CAT.[318] However, these cost could be lower if the Commission is overestimating the number of insourcing industry members, in particular, the additional cost could drive some insourcing industry members to begin to outsource. The Commission believes that ongoing costs associated with reporting the newly required information to CAT would already be covered by ongoing cost estimates included in its cost estimates for the CAT NMS Plan. The Commission further believes that similar implementation and ongoing costs would be borne by each of the service providers that provide order handling systems and regulatory data reporting services to Industry Members that outsource these systems.

For Industry Members that outsource, the Commission believes that implementation costs would be far lower because the service bureaus that provide them with order handling systems and regulatory data reporting services would adapt those systems on their customers' behalf. The Commission estimates that the 1,092 outsourcing Industry Members would incur a onetime-aggregate expense of $1,092,000 or $1,000 individually to update hardware and software to facilitate reporting the new buy to cover elements to CAT.[319] Additionally, 44 outsourcing industry members would incur an aggregate one-time cost of $44,000 or $1,000 individually to update systems to facilitate reporting the new bona fide market making exception elements to CAT.[320] However, these costs could be higher if some

[310] *See supra* PRA Table 4.

[311] *See supra* PRA Table 3.

[312] According to an industry performance evaluations for server processors, computing speed has increased by at least 12 times since 2007 (the earliest year in the data). The Commission believes that computing performance has increased by a greater amount since 2003. The Commission re-estimated the processing burden using a factor of 12 (as a conservative estimate of improvements in processing speed). Dividing the estimated burden per broker-dealer of 7,107 hours by 12 yields a burden per broker-dealer of approximately 592 hours per broker-dealer and a total burden of 721,063 hours. *See* Year on Year Performance (for server processors), PassMark Software Pty. Ltd., *available at https://www.cpubenchmark.net/year-on-year.html.*

[313] *See supra* note 143.

[314] *See supra* Part VII.D.4.a (for more information on costs for CAT Plan Participants).

[315] *See supra* Part VII.C.1 (for a discussion of the PRA burdens associated with the Proposal to Amend CAT).

[316] *See supra* note 172.

[317] *See supra* Part VI.D.4.c (for a breakdown of PRA costs related to the Proposal to Amend CAT).

[318] *Id.*

[319] *Id.*

[320] *Id.*

current insourcing industry members begin to outsource as a result of the increased costs, which would lead to an overall reduced cost for the rule as outsourcing is less costly than insourcing. The Commission believes that the costs of service bureaus adapting those systems would be passed to their Industry Member customers.

Although, the Proposed Rule 205 and the Proposal to Amend CAT to add buy to cover would impose costs on broker-dealers who are CAT Reporters, the Commission believes they would be less costly than previous related proposals, such as the ''open/close indicator'' in the original CAT NMS plan proposal.[321] The originally proposed CAT NMS Plan would have included an ''open/close indicator,'' which could be used to identify orders buying to cover short positions. However, several commenters stated that an ''open/close indicator'' would be overly burdensome, with one commenter stating that such burdens would be, in part, the result of ''the lack of a clear definition of the term [open/close] for equity transactions,'' and the indicator was not adopted.[322] By contrast, Proposed Rule 205 includes a clear definition of when a ''buy to cover'' indicator would be required to be reported.[323] In addition, reporting buy to cover on some buy orders is a narrower requirement than reporting an ''open/close indicator'' on all buy and sell orders. Specifically, aside from focusing only on some buy orders, Proposed Rule 205 is designed to rely solely on information within the broker-dealer[324] and the Proposal to Amend CAT would require reporting on order receipt and order origination reports only.

8. Risk of Circumvention Through Derivatives

The Commission believes that the risk that Managers may attempt to circumvent the reporting requirement by trading derivatives may be high, particularly for stocks with liquid options.[325] The risk may also increase if a robust single-stock futures market develops over time.[326] Indeed, Proposed Rule 13f–2 and Proposed Form SHO could be a catalyst for growth in derivatives markets as short sellers look for new avenues to take the economic equivalent of short positions while avoiding these proposed disclosures.

The Reporting Thresholds in Proposed Rule 13f–2 are on a Manager's gross short position in the equity security itself, and does not included the calculation of derivative positions. Consequently a Manager seeking to build a large short position while avoiding reporting their positions on Proposed Form SHO could hold a short position just below a Reporting Threshold and use derivatives to take positions above that threshold.[327] Using derivatives to circumvent the short selling reporting may be costly. Options tend to be more expensive than equity transactions particularly for less liquid securities. Additionally some equities do not have listed options. Consequently, the Managers' desire to avoid the costs associated with reporting Proposed Form SHO information articulated in Part V.4.i and V.4.ii is balanced against the increased cost of using derivatives such as options to execute a short position. Thus for some stocks, *i.e.,* those with illiquid or non-existent options, the threat of circumvention through options may be minimal. However, academic research has shown that investors have used options to circumvent other short selling restrictions, thus there is a significant risk that there would be some attempt to circumvent the rule using derivatives, particularly in stocks with liquid options markets.[328]

E. Efficiency, Competition and Capital Formation

1. Efficiency

Markets function best and are most efficient when all relevant information regarding a security is known and is incorporated into prices.[329] This includes negative information. When negative information is not tradable, stocks tend to be overpriced leading to an inefficient allocation of capital across the economy.[330] More efficient prices lead to better economic outcomes for the macro economy as capital flows into high value projects and out of low value projects. Short sellers have incentive to uncover negative information and to trade to profit from that information. As discussed in Part V.4.ii, more transparency in short selling would improve the amount of information that investors have to value a stock—increasing price efficiency. However, it could also disincentivize fundamental research which would harm price efficiency by limiting the amount of total information has been discovered. Overall the impact of the Proposals on price efficiency is uncertain.

Additionally, Rule 205 and the CAT amendment would increase the efficiency with which the Commission accesses and performs analysis relating to bona-fide market making data or buy to cover data for regulatory or enforcement purposes. Currently, the Commission does not have an efficient means to determine buy to cover transactions. The Commission could, in theory, estimate buy to cover information using existing CAT data. However, constructing positions for a broad set of traders from CAT is inefficient and due to CAT lacking all information relative to an investor's position—*e.g.,* options assignments—could result in incomplete results.[331] Additionally, the amendment to CAT would improve the efficiency of the Commission's oversight and enforcement of regulations relating to the bona fide market making exception by providing more efficient access to data on how individual market makers are using the exception. Currently the Commission must request information about the use of the market maker exception from specific broker-dealers.[332]

2. Competition

Investors compete with one another to gather information that they use to enact trading strategies. Academic research indicates that when short selling is costly, then investors owning the asset have an advantage in gathering information due to the reduced cost of acting on whatever information that

[321] *See supra* note 101. *See also supra* Parts VII.C, VII.D.4.b, and VII.4.c.

[322] *See supra* Part V.A (for more discussion on the original CAT NMS Plan proposal that would have included an ''open/close indicator'').

[323] *See supra* note 104.

[324] One commenter on the CAT NMS Plan Notice stated that including an ''open/close indicator'' indicator for equities would require ''involve parties other than CAT Reporters, such as buy-side clients, OMS/EMS vendors, and others.'' *See supra* note 101.

[325] *See supra* note 202, R. Battalio, and P. Schultz, (2011), Grundy, Lim, and Verwijmeren (2012).

[326] *See supra* note 202, Jiang, Shimizu, and Strong (2019).

[327] Recently proposed rule 10B–1 would require reporting of swap positions above a certain threshold. Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, Exchange Act Release No. 93784; *available at https://www.sec.gov/rules/proposed/2021/34-93784.pdf.* There is no reporting requirement for large options positions or other derivatives.

[328] *See supra* note 202.

[329] *See* Eugene F. Fama, Efficient Capital Markets a Review of Theory and Empirical Work, *The Fama Portfolio* 76–121 (2021).

[330] *See supra* note 281.

[331] *See supra* Parts VIII.C.5.iv and VIII.F.1.i (for further analysis of the use of CAT data to estimate buy to cover transactions).

[332] *See supra* Parts V.B and Part VIII.C.4 (for a further discussion of the inefficiencies of existing data with regards to oversight and enforcement of rules relating to bona fide market making).

they gather.[333] By increasing the cost of short selling for managers above the Reporting thresholds, as discussed in Part VIII.D.1 and VIII.D.2, the rule may increase the advantage that investors who own the asset have over those who do not in terms of gathering information with the overall result being that investors not owning the asset may experience lower returns relative to those owning the asset due to increased cost of acting on negative information.

Relatedly, fund performance is a key determinate of investor flows. The Commission believes that the proposal could harm competition for fund flows among Managers who do and do not use short selling strategies. For instance, managers that are skilled at uncovering negative information may face additional costs when transacting on this information, potentially leading to lower returns. Thus Managers specializing in uncovering overpriced stocks may find themselves at a competitive disadvantage relative to managers who do not use short selling in terms of their ability to compete for fund flows.

The Commission believes that Proposed Rule 205 and the Proposal to Amend CAT would not alter significantly the competitive landscape for broker-dealer services. For smaller broker-dealers the direct costs associated with complying with Rule 205 and the CAT amendment would likely be borne by the larger entity that they contract with for the relevant services. Since many of the compliance costs are fixed, the increased expense to any one smaller broker-dealer would likely be relatively small and come in the form if increased costs for services from the entity that they contract with.[334] Because larger broker-dealers enjoy economies of scale, they should be able to absorb the costs associated with compliance more easily. Consequently, the Commission believes that the effect of Rule 205 and the CAT amendment would have minor impacts on broker-dealer competition.[335]

3. Capital Formation

One of the primary roles of the securities markets is to allocate capital (money) across the economy. If investors believe that a company is undervalued then, all else being equal, they will buy that stock; if many investors buy the stock, the price for that stock will increase—lowering the cost of equity financing and making funding projects easier for the firm.[336] On the other hand, if investors believe that a company is overvalued then, all else being equal, they will sell or short sell the stock to invest in other more profitable ventures. If enough investors sell or short the stock, then the stock price will decline. A lower stock price implies more expensive equity financing and thus a higher weighted average cost of capital. When stocks are overpriced, they are inherently allocated too much capital, which deprives more productive ventures from receiving optimal capital and hinders economic progress. Consequently, short sellers contribute to capital formation by enhancing price efficiency which ensures an optimal allocation of capital across firms. Thus, to the extent that the Proposals discourage short selling, as discussed in Part VIII.D.1 and VIII.D.2, it may lead to the overpricing of some stocks and the underpricing of others.[337] This mispricing distorts optimal capital formation as it implies that some firms may have a cost of capital that is relatively too high or too low with respect to that firm's fundamentals and risk profile.

Additionally, academic research suggests that managers learn from stock price changes, using them as a way to tap into the 'wisdom of crowds' phenomena to improve decisions.[338] For instance, if a firm announces a capital investment or other project, and the stock price moves up or down, then managers may use this information as a signal about the market's perception of the value of that project. Thus stock price reactions may be an input into manager decisions in terms of when and how to invest capital. To the extent that the rule discourages short selling, it may make it more difficult for managers to extract signals from stock prices about the value of proposed capital investments—particularly low value projects as the Proposals my dampen the market's ability to respond to negative information.

The costs associated with Managers monitoring their short positions for compliance with reporting Proposed Form SHO along with the negative economic effects detailed in Part VIII.D.1, VIII.D.2, and VIII.D.7 may harm capital formation, specifically capital formation using convertible debt if it increases the cost of short selling. Investors may be less inclined to purchase convertible debt if the cost of hedging that purchase by short selling the security becomes more expensive—through both the direct and indirect costs associated with Form 13f–2.[339] Thus, to the extent that the costs associated with Proposed Form SHO increase the cost of short selling they may also increase the cost of hedging convertible debt and may make that form of financing more expensive. This effectively increases the weighted cost of capital for firms that use convertible debt and may hinder their ability to fund operations, including new investments.

In contrast, the Proposals may have a positive influence on capital formation if they limit short selling based fraud. Specifically, in one type of fraud, investors holding convertible debt would short sell a stock in an attempt to drive down the price and then convert their debt to equity to cover their short positions at the lower price. To the extent that the rule facilitates better oversight and prosecution of this sort of fraud, it may facilitate capital formation by lowering the risk that convertible debt holders would engage in this sort of fraud.

Proposed Rule 13f–2 may also affect capital formation through investor confidence. Some Commenters have suggested that short selling, and in particular a lack of short selling disclosure leads some investors to have less confidence in financial markets,[340] although the results may be mixed. The Commission believes that improving short selling transparency would strengthen investor confidence which could help make investors more willing to invest, resulting in the promotion of capital formation.[341]

[333] *See* Dixon (2021), *supra* note 242.

[334] *See supra* Part VIII.D.7 (for a discussion of direct compliance costs).

[335] *See also supra* note 244, CAT Proposing Release (where the Commission discusses the implementation of CAT and its effect on broker-dealer competition).

[336] A firm's external cost of finance is known as the weighted average cost of capital (WACC). It is simply the weighted average of the firm's cost of equity and the firm's cost of debt. Cost of equity (COE) is simply the return required by investors to assume the risks of owning the stock, computed as COE = (dividends per share/market cap) plus dividend growth rate. In this computation, market cap is simply the number of shares outstanding multiplied by the current stock price. If the stock price decreases, then mechanically the firm's COE would go up. *See, e.g.,* R.A. Brealey, S.C. Myers, F. Allen, and P. Mohanty, Principles of Corporate Finance, *Tata McGraw-Hill Education* (2012).

[337] *See supra* note 267, Miller (1977).

[338] *See* I. Goldstein and A. Guembel, *Manipulation and the Allocational Role of Prices,* 75 (1) The Rev. of Econ. Studies 133–164 (2008).

[339] *See, e.g.,* Stephen J. Brown, Bruce D. Grundy, Craig M. Lewis and Patrick Verwijmeren, *Convertibles and Hedge Funds as Distributors of Equity Exposure,* 25 (10) Rev. Fin. Stud 3077–3112 (Oct. 2012).

[340] *See* NASDAQ, OTC Markets, and CFA Institute letters (in response to FINRA's short selling proposal) *available at https://www.finra.org/rules-guidance/notices/21-19#comments.*

[341] *See* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, at 297 (Mar. 10, 2010), *available at http://www.sec.gov/rules/final/2010/34-61595fr.pdf.*

F. Reasonable Alternatives

1. Alternative Approaches

i. Releasing Aggregated CAT Data

As an alternative to collecting, aggregating, and publishing Proposed Form SHO, the Commission could amend the CAT NMS Plan to collect additional information so that the Commission or the Plan Processor could aggregate and publish CAT Data.[342] Specifically, the Commission could retain proposed Rule 205 and the amendment to the CAT NMS plan requiring the reporting of bona fide market making and buy to cover information to CAT and then use CAT data to have either the Commission or the Plan Processor provide short selling information to the public. This alternative would effectively eliminate the thresholds for reporting. This alternative could not be implemented until the CAIS system in CAT is fully operational. Currently it would be extremely difficult to map Firm Designated IDs ''FDIDs''—which are currently broker-dealer specific—to individual Managers on a large scale. However this functionality is anticipated once the CAIS system is fully operational.

CAT data currently contains a short sale mark and also provides the identities of the individuals transacting. Consequently the Commission or the Plan Processor could aggregate information on the number of short sales that Managers engage in from CAT and disseminate aggregated information to the public at monthly intervals—or more frequently. The Commission or Plan Processor could publish daily statistics on the number of short sales engaged in by Managers each day in the prior month as reported in CAT. Additionally, the reports could include information on options transactions that lead to short positions, such as purchasing a put option, or writing a call option.[343] Furthermore, a longer time series (for example, a rolling year) to estimate a Manager's position could be aggregated using CAT data. These could be aggregated to create a market-wide short position estimate. However, this estimate would be inaccurate because the alternative does not consider collecting in CAT information on changes in positions that come from activity other than secondary market transactions, such as secondary offering purchases, conversions, creations and redemptions, and option exercises and assignments. This inaccuracy could also result in the market-wide short position estimate being less accurate than current short interest data.[344]

The alternative would result in lower benefits than Proposed Rule 13f–2 and Proposed Form SHO. For each trading day, the alternative would involve publishing the net change in short sale positions engaged in by Managers.[345] The data published under this alternative would have significant overlap with the data that would be published under Proposed Rule 13f–2 and Proposed Form SHO. One difference between this alternative and the current data proposed to be collected in Proposed Form SHO and published by the Commission is that the data in this alternative could be more comprehensive in terms of the breadth of Managers whose short selling information could be aggregated and published,[346] because the Commission could publish aggregated data on short selling transactions from all Managers instead of just those that meet the threshold. However, the published data would be less accurate in terms of estimating positions and changes in positions as they would not include certain activity, such as options assignments, that are not collected in CAT but that may affect a short position. In addition, the alternative would not permit the publication of information on the percentage of positions that are fully or partially hedged. As a result of these differences, this alternative would result in less clarity about bearish sentiment among Managers. Thus, in terms of price efficiency, this approach would not have many of the same benefits as Proposed Rule 13f–2 and Proposed Form SHO.

The alternative would also reduce the benefits of comparing the published data to short interest because the alternative would focus on transaction dates rather than settlement dates and the alternative would not be restricted to large positions. Short interest measures short positions as of two settlement dates per month. A comparison of the data in the alternative to the short interest data would require either publishing the position data as of the transaction dates that correspond to the short interest settlement dates or users would have to use the activity data to offset the dates themselves. Further, the inclusion of more than just Managers with large short positions means that the information conveyed by the alternative relative to short interest would be less additive than under Proposed Rule 13f–2 and Proposed Form SHO.

This alternative would also mitigate some of the concerns associated with Managers being exposed to increased risk of short squeezes or other retaliation as discussed in Part VIII.D.1 and VIII.D.2. This reduced risk would come because it would be more difficult to determine whether the short selling activity reported was due to many Managers short selling small amounts, or just a few Managers short selling large amounts. It would also be more difficult to identify individual short sellers based on the data. A lower risk of retaliation or short squeezes may also mitigate some of the negative effects of the proposal with regard to less overall short selling or fundamental research that are described in Part VIII.D.2, depending on the delay in publication under the alternative.

Additionally, this approach would have lower compliance costs for Managers than the current proposal, as it would not require Managers to file Proposed Form SHO. While it would result in the same costs for Industry Member reporting as those associated with Proposed Rule 205 and the Proposal to Amend CAT, it would increase costs associated with the Plan Processor improving processing power for the aggregation of CAT data if such computations could not be performed with existing resources (without reducing other functionality). Any costs incurred by the Plan Processor would be passed along to Plan Participants and Industry Members.

As previously stated, the drawback to this alternative relative to the existing proposal is that it would take some time before CAT data could be used to develop an estimate of the size of short positions. Thus the data would not immediately provide the Commission or market participants with information about the size of individual large short positions. Consequently, to the extent that knowing the total size of short positions held by managers with large positions conveys fundamental information to the market, then this fundamental information would not be immediately available if the Commission were to adopt a version of this alternative. Additionally, the data provided by this alternative would lack

[342] This alternative presumes that the Customer and Account Information System ''CAIS'' system in CAT is operational, thus allowing the Commission to track trades of individual traders.

[343] In this alternative, however, CAT would not contain the information on option expirations or assignments.

[344] FINRA's process of gathering and validating short interest data takes approximately two weeks. *See supra* note 221.

[345] This contrasts with the Proposed Rule 13f–2 which requires reporting based on the settlement date which is normally two business days after the transaction day.

[346] This assumes the Managers that could be identified in CAT could include all those that would be responsible for reporting under Proposed Rule 13f–2 and Proposed Form SHO.

transactions outside of the purview of CAT that may affect short positions. Thus the data provided by this rule would always be estimates of total short positions, which could be quite inaccurate for some Managers. Another drawback to this alternative is that releasing CAT data to the public could increase security risks. CAT contains highly sensitive information and creating a process that would release portions of the data, even if aggregated, could present risks.

The Commission could also consider two variations of this alternative. The first, which can be referred to as the minimalist approach, would not include Proposed Rule 205 and the Proposal to Amend CAT and instead would provide Manager short selling statistics based on existing CAT data.[347] The advantage to this variation is that it would provide additional information about the short selling activity and positions of Managers, compared to what is currently available, while requiring no additional resources from Industry Members except, perhaps, those passed on from an increase in resources for the Plan Processor to build out processing capacity—if the Plan Processor is chosen to aggregate reports and if it currently lacks such capacity. An additional drawback to this variation relative to the alternative above is that it would further limit the data that regulators have access to. Thus the benefits to having bona fide market making and buy to cover information described throughout Part VIII.D would not occur.

Lastly, a larger expansion of CAT could achieve at least the same data value as in Proposed Rule 13f–2 and Proposed Form SHO. For example, CAT could expand to require the reporting of all the information currently proposed to be collected in Proposed Form SHO. Specifically, the Commission could expand CAT to include data on account positions, including short selling positions as well as hedging information associated with those positions. In addition, CAT could be expanded to capture information on changes in those positions, options assignments, options exercises, secondary offering purchases, conversions, and other position changes. Under this approach, regulators would have access to the same data as if Managers filed Proposed Form SHO but for all short sellers, not only the subset of Managers reporting on Proposed Form SHO. This approach would also result in additional information available to regulators not collected in the Proposed Form SHO that could improve investor protections. In addition, this alternative would reduce costs for Managers who are not Industry Members because they would not be required to report new information. However, costs would increase for Industry Members who would have to report a lot of new information on CAT report types that don't exist today and for Participants who would have to implement changes and work out technical specifications for new types of CAT reports. Further, more Industry Members would report this information to CAT compared to Managers require to report information on Proposed Form SHO. It would be a major undertaking for both the Plan Processor as well as for industry participants to build out and adapt systems to collect, process, and publish this information. This implementation would likely be very complex and take a significant amount of time to compile. Overall, the cost of this alternative is likely to exceed the costs of Proposed Rule 13f–2 and Proposed Form SHO.

Further, if the Commission were to expand CAT to collect additional information beyond what would be captured by the Proposal to Amend CAT and Proposed Rule 205, such as position information, then these additional expansions would incur significant direct costs.

ii. FINRA Reporting

As discussed in part VIII.C.4.i, FINRA already collects and, together with the listing exchanges, disseminates aggregate short interest that it collects from member broker-dealers. Consequently, the Commission could codify their existing process to ensure that in continues in perpetuity. This alternative would have no additional costs to market participants, but would substitute a Commission mandate for the publication of the short interest data.

Similarly, the Commission could require FINRA to publish a version of their short interest information that specifically identifies the aggregate short interest of Managers—separate from other short interest. To accomplish this, reporting broker-dealers would separately report in their reports to FINRA the short positions that originate from Managers. FINRA would then compile both total short interest, as they currently do, as well as a Manager specific short interest. Because broker-dealers already have experience reporting short interest data to FINRA and would thus not need to build out new systems to report the data, this alternative may be less expensive than the existing proposal as it would only require a modification of an existing process. This alternative would not provide the Commission with the positions of any identified Managers or any Manager-specific activity data, nor would it provide information on which positions are fully or partially hedged, thus the benefits and risks associated with these data articulated throughout Part VIII.D would decline.

The Commission also expects that data on Manager short interest in addition to total short interest would likely not provide much incremental value over the existing short interest data due to the likely significant overlap of the short positions of Managers and total short interest, and the absence of activity information to better understand changes in short interest.[348] Thus, while the alternative that requires FINRA to produce separate short interest data for Managers would reduce costs to market participants relative to the existing proposal, it also may not provide the market or regulators a significant incremental benefit relative to existing short selling data.

iii. Broker-Dealer Reporting to EDGAR on Behalf of Managers

The Commission could modify the existing proposal to allow broker-dealers to file Proposed Form SHO reports with the Commission on behalf of Managers. This alternative may reduce costs as it could concentrate reporting with broker-dealers that have significant experience collecting and providing such information—increasing operational efficiency.[349] On the other hand, Managers may use multiple prime brokers and thus the reporting prime broker may not have easy access to information about all such Manager's positions and activity in a security. Consequently, the prime broker would either need to report based on its limited information, which may lead to less complete data, or to gather additional information from the Manager about potential activity associated with another prime broker.[350] Reporting only information known by one prime broker could also result in less information if a Manager that

[347] Once again, this variation and the following variation presume that the CAIS system is fully operational.

[348] Analysis of Form SH data indicates that these data, which would be a subset of the data collected in this alternative, amounted to a high percentage of short interest.

[349] *See* MFA Letter, *supra* note 306 (p. 3 for 10a–3T).

[350] The latter could result in the additional complication of double reporting or prime brokers having to coordinate on who reports a position. Likely, the least costly solution could involve Managers being responsible for informing their prime brokers of their threshold status.

otherwise would have exceeded the threshold for reporting does not exceed the threshold at one or more prime brokers. Requiring additional data collection may increase complexity and costs as Managers and broker-dealers would need to develop systems by which a Manager provides information about their activity with other prime brokers to their reporting broker. Or, the Commission could allow broker-dealers to report on behalf of Managers only if the broker-dealer could report full information. Thus Managers using multiple prime brokers would have the option of providing comprehensive information to their reporting prime broker, or they could report Proposed Form SHO data themselves.

iv. Harmonization With European Disclosure Requirements

The Commission could also explicitly craft Proposed Rule 13f–2 and Proposed Form SHO to be consistent with European disclosure requirements. In 2012, the European Parliament and the Council of the European Union adopted regulations on short selling (the ''SSR'') that standardized the reporting threshold for all EU member states.[351] Under the SSR, the trading entity reports to the regulator when their net short position reaches the initial threshold of 0.2% of the share capital of the company, and in 0.1% up and down increments thereafter.[352] The threshold for reporting to the regulator recently was lowered to 0.1%.[353] Net short positions are computed taking into account relevant derivative positions such as options. If the net short position reaches 0.5% of the share capital of the company, then the reported short position is made public with the identity of the short seller revealed. New filings are required to be made whenever the short position increases or decreases by 0.1% of the share capital of the firm. In the EU, trading entities must submit their data to the regulator by 3:30 p.m. on the following trading day.[354] Trading entities accomplish public disclosure via a central website operated or supervised by the relevant competent authority.[355]

Consequently, the Commission could structure the rule to require Manager short selling reports that are consistent with the European regulations in terms of the thresholds for reporting, the computation of the threshold, the items reported, when short sale information is made public, and when new reports have been issued. The advantage to this alternative would be that managers who engage in short selling in both the United States and in Europe would face similar regulations in both places—which may decrease the cost of compliance with both regulations.[356]

The EU structure whereby individual short sellers' names are made public may raise the risk that investors may gather less fundamental information relative to the existing proposal as the risk of retaliation towards short individual sellers may increase, as well as the ability for market participants to engage in copy-cat strategies that decrease the profitability of gathering information.[357]

The EU data is more timely than what is considered in this proposal as the forms are posted publicly immediately after receipt by the regulator, potentially facilitating greater price discovery but at the cost of lowering the value of gathering information. Further, the EU guidelines do not provide activity data. Thus, market participants could not learn from an analysis of how short selling positions change over time. For instance, firm managers could only see the size of net short positions and thus may be hindered in their ability to learn from when short sellers built their positions and whether the building of a short position was in response to a specific manager action or firm announcement.

2. Data Modifications

i. Release Proposed Form SHO Data in Alternative Formats

The Commission could release the information included in Proposed Form SHO in a different manner. This alternative could take one of several forms. For example, the Commission could release each Proposed Form SHO report to the public exactly as it is filed, identifying the Managers. The Commission could also release the Forms as filed, but with the identities of the filers stripped. The Commission could also release the aggregated data as in the current proposal but it could publish the data in different ways in the aggregated Proposed Form SHO report, such as, for example, publish the number of entities underlying the aggregated data, publish aggregations of the various categories of changes in short positions, or publish increases in short positions separate from decreases.

In the first alternative, the Commission could release Proposed Form SHO as filed, allowing all market participants to know the identities of short sellers—similar to the EU regulation discussed above. This would increase the information that market participants have to evaluate sentiment in the market. For example, if a short seller is viewed as sophisticated and informed, then releasing identifying information would likely spur copy-cat trading strategies. This outcome has been documented with respect to the EU regulation and suggests that revealing the identities of the short sellers may diminish the value of becoming informed.[358] In addition, all the detailed information on daily short activities across the various activity categories could reveal trading strategies, particularly if the Manager is identified. This information would also allow market participants to better manage risk by allowing them to manage their exposure to Managers with large short positions. Additionally, releasing the names of large short sellers would further increase the likelihood that the short seller would be the victim of a short squeezes or other retaliatory actions as described in Part VIII.D.1.

Similarly, the Commission could publicly release individual Proposed Form SHO filings with identification information stripped from the released data. This alternative would allow market participants a clearer view into the activities of large short sellers, potentially improving their ability to learn from the actions of large short

[351] *See* European Parliament and the Council of the European Union, Regulation No. 236/2012 (Mar. 24, 2012), *available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF* (The SSR was adopted by the European Parliament and the Council of the European Union on March 14, 2012 and became effective on November 1, 2012.).

[352] *Id.* (at Article 5(2)).

[353] The threshold was temporarily lowered in March 2020 in response to the COVID–19 pandemic. In October 2021, the change became permanent. *See* European Union, Commission Delegated Regulation No. 236/2012, Register of Commission Documents, *available at https://ec.europa.eu/transparency/documents-register/detail?ref=C(2021)6815&lang=en&utm_source=Cleverreach&utm_medium=email&utm_campaign=Update%20Shareholder%20Activism&utm_content=Mailing_13052681.*

[354] *Id.* (at Article 9(2)).

[355] *Id.* (at Article 9(4)).

[356] Due to uncertainties regarding the EU short selling data regarding the identities of short sellers and the ability to map those IDs to US Managers, the Commission cannot identify the number of US Managers that currently comply with EU regulations.

[357] For analyses of how the SSR lead to increased copycat trading, lower price efficiency, and increased volatility, *see* Stephan Jank, Christoph Roling, and Esad Smajlbegovic, *Flying Under the Radar: The Effects of Short-Sale Disclosure Rules on Investor Behavior and Stock Prices,* 139 (1) J. of Fin. Econ. 209–233 (2021); Charles M. Jones, Adam V. Reed, and William Waller, *Revealing Shorts an Examination of Large Short Position Disclosures,* 29 (12) The Rev. of Fin. Studies 3278–3320 (2016).

[358] *See supra* Part VIII.F.1.iv (discussion in section).

sellers relative to the current proposal. For instance, the data would allow market participants to know whether short sentiment was broadly held—as would be indicated by many filings—or concentrated—as would be indicated by few filings. This information could potentially improve the market assessment of bearish sentiment relative to Proposed Rule 13f–2, improving price efficiency.

However, the indirect costs of this alternative would be greater than for Proposed Rule 13f–2 and Proposed Form SHO. Releasing all the information from Proposed Form SHO could reveal trading strategies that would be costly even if the identities of the short sellers remained anonymous. For example, releasing this information may increase the risk of copycat trading which eats into the profits of acquiring information. It may also provide information about how vulnerable short sellers may be to a short squeeze as it could give a signal about whether a short seller has a large and potentially vulnerable short position thus increasing this risk to short sellers. In this case, the negative effects of the rule on the value of collecting information and of short selling in general would be greater than the current proposal, leading to less price efficiency and potentially more volatility. Additionally, even though the data could be released anonymously, it is not clear that in all cases the identities of the individual short sellers would remain anonymous.[359] If market participants were able to back out the identities of individual short sellers, then the risk of retaliation or short squeezes would increase relative to Proposed Rule 13f–2 and Proposed Form SHO.

Alternatively, the Commission could release the data as specified in the current proposal but also include the number of entities whose Proposed Form SHO reports were collected. This information would provide the market with additional detail about whether short sentiment was broadly held by multiple managers, or narrowly held by just one or a few. This information could be useful as market participants assess bearish sentiment in the market and adjust their actions accordingly. Adding this information may also increase the risk of short squeezes or other retaliatory actions in the case where there were very few reporters of Proposed Form SHO. In the Form SH data collected under Temporary Rule 10a–3T, 32% of stocks had only one Manager reporting a position per month.[360] Such a situation could signal to market participants that one, or a few, short sellers have large short positions that could potentially be vulnerable to a squeeze.

The Commission could collect Proposed Form SHO data as proposed but in the data made public, the Commission could aggregate at the issuer level as opposed to the security level. Aggregating at the issuer level would allow users of the data a simpler view into overall short selling for the whole firm. However, computing this aggregation introduces complexity, as different share issues sometimes have different prices or voting rights, thus it may not make economic sense to aggregate all short selling data across all share classes for the same issuer. This effect would decrease the information content of the data with respect to bearish sentiment, which decreases what market participants could learn from the data, but also would make it more difficult for market participants to copycat short selling strategies.

As another alternative, the Commission could release statistics on the Proposed Form SHO filings aggregated across Managers but not netted across the various activity categories. This would allow market participants to not only see the extent of the position changes of large short sellers but also how they achieve their position changes, including whether they create or cover positions in the equities market or by options exercises, for example. The Commission believes that such information could risk revealing trading strategies, even if aggregated across Managers, particular if Managers have correlated strategies. As a result, this would be more costly to Managers than Proposed Rule 13f–2 and would dissuade fundamental research more. On the other hand, while such information is of more regulatory value, by publicly releasing more detailed activity data, some market participants may benefit from learning the various ways that short sellers change their positions.

Similarly, the Commission could collect Proposed Form SHO data as proposed but publicly release the daily aggregate increases in short positions separately from the daily aggregate decreases in short positions as opposed to daily net changes to short positions as currently proposed. This approach would provide the public more detailed information and understanding on what drives changes to short positions. However, separating daily aggregate increase from decreases in short positions could increase the risk of revealing trading strategies, which could disincentivize short selling and harm market quality.

ii. Collect Data on Derivatives Positions

Investors can use derivatives to take an economically short position in a security. For example, an investor with a bearish view of a stock can purchase a put option in that stock. Consequently, for a more complete view of the total economic short position that a Manager has taken, the Commission could require Managers who report Proposed Form SHO to also disclose their derivatives positions on underlying equity securities in derivatives such as options and total-return swaps as an alternative to the existing proposal which does not directly collect information on derivatives.

Requiring this data would provide a more complete view of the economic short position that a Manager engaging in a large short sale has taken. Consequently, the information would aid market participants in gauging bearish sentiment in a security relative to Proposed Rule 13f–2 and Proposed Form SHO. This information may also help the Commission to better evaluate potentially risky short positions and respond more quickly in the case of a market event. The Commission could also better reconstruct market events, such as the recent meme stock events in January 2021, with options positions data.

Requiring options data to be reported on Proposed Form SHO would increase the compliance costs to Managers of reporting on Proposed Form SHO. While Managers generally track their options exposure carefully, it is frequently different trading desks that execute options trades and equity transactions. Thus, it is possible that Managers use separate systems to track their options and equity positions. For these Managers, collecting options and equity transactions to report the data required for Proposed Form SHO would require building a process to pull data from two separate systems—increasing the cost of complying with the rule.

[359] Issuers have been known to hire private investigators to try and uncover the identities of short sellers when they learn that their stock is being targeted by short sellers See supra note 258. Additionally, researchers have used algorithms to unmask the identities of individuals from masked data released to the public by the SEC. *See* Huaizhi Chen, Lauren Cohen, Umit Gurun, Dong Lou, and Christopher Malloy, *IQ from IP: Simplifying Search in Portfolio Choice,* 138 J. of Fin. Econ. 118–137 (2020). While the Commission could design this alternative to avoid the specific vulnerabilities exploited by Chen et al (2020) it is possible that motivated researchers and market participants could find some other unforeseen way to link the public data to individual short sellers.

[360] *See supra* note 80 (for more information on methodologies and caveats for using Form SH data).

Requiring derivative position information may also be duplicative of other derivatives reporting requirements. For instance, recently proposed Rule 10B–1 requires individuals, or groups of individuals, who own security-based swaps that exceed a certain threshold to report certain information to the SEC, which information would be made publicly available.[361]

iii. Report Net Short Positions Instead of the Gross Position With Hedging Information

The Commission could require managers reporting Proposed Form SHO data to report net short positions instead of gross short positions. Net short positions would take into account any hedging the Manager engages in. For instance, a Manager that has a large long position in options that is largely hedged using short sales in equities is not taking an economically significant short position in the security. Fully hedged short positions are less likely to be manipulative in nature, or to pose systemic risk. Consequently, the Commission could limit reporting to only Managers whose economic short positions surpass the thresholds. Doing so would limit the amount of data collected by the Commission and would thus reduce the cost of the alternative relative to Proposed Rule 13f–2 but also reduce somewhat the value of the data in terms of using it to reconstruct market events. For instance, during the recent meme stock phenomenon, for certain stocks it became difficult to hedge options transactions using the underlying security due to the significant price changes in the spot market. Consequently, positions that may have previously appeared to have been hedged, and thus low risk, may no longer be as hedged as previously supposed, and in this case, large short positions that were initially hedged may become systemically important as the hedge breaks down due to unforeseen extreme market events. In this case, it would be useful for the Commission to have information on large hedged short positions largely to aid in reconstruction of market events. This alternative would limit what the public and the Commission could learn from large hedged positions relative to the Proposed Rule 13f–2 and Proposed Form SHO. For instance, the alternative would preclude a comparison of total short interest with reported large hedged short positions, which may provide additional information to the market about the activities of large, though perhaps non-information based, traders.

Additionally, the Commission could require Managers to report the delta value of their hedged positions rather than providing an indicator for whether a position is fully or partially hedged.[362] This alternative could have some of the same advantages as the other alternatives in this section. If the Commission published this information aggregated across Managers, then market participants would have a clearer view into economic—*i.e.* unhedged—short positions than is provided by the Proposed Rule 13f–2 and Proposed Form SHO. The cost of this alternative is an increased reporting burden for Managers as they would be required to compute for the report delta value of their hedge. However, knowing information about the delta of short seller's hedge can provide information about how vulnerable a short seller, or short sellers, may be to a short squeeze. If this information was not made public by the Commission, however, it would allow the Commission an improved view into individual short sellers with potentially risky short positions without raising those concerns.

3. Threshold Modifications

As an alternative to Threshold A's two-pronged threshold, the Commission could require reporting Proposed Form SHO at either higher or lower thresholds—or no threshold. When soliciting comments for Temporary Rule 10a3–T, commenters suggested thresholds ranging from 1% to 5%.[363] When selecting thresholds, the fundamental economic tradeoff is the value of the data versus the cost of collecting the data.

Alternative thresholds that are lower than Threshold A or Threshold B specified in Proposed Rule 13f–2 or an alternative that would not contain a threshold would produce more data as more entities would be required to report. In the Form SH data collected under Temporary Rule 10a–3T, the threshold of $10 million or 2.5% would collect 89% of the dollar value of the short positions required to be reported.[364] Therefore, the increase in coverage from a lower threshold would be low relative to the coverage in the proposed Threshold A. Notwithstanding the low potential for an increase in coverage, the Commission recognizes that this increased coverage could increase benefits. For example, this additional data from the alternative would enhance the benefits to the Proposed Form SHO data articulated above relative to Proposed Rule 13f–2 and Proposed Form SHO. Specifically, it would provide market participants with a clearer view of Manager bearish sentiment than the current proposal provides for as more managers would be required to report the data, making the data more comprehensive. A lower threshold would also allow the Commission to more easily reconstruct significant market events where short selling is involved and enhance Commission oversight of short selling—again because the data would be more comprehensive.

A lower or no threshold would increase the cost of reporting Proposed Form SHO data in terms of direct costs associated with Managers compiling and submitting the required data thorough EDGAR and in the indirect costs associated with revealing short sellers' information. In the Form SH data collected under temporary Rule 10a–3T, the number of reporting Managers for the *de minimis* threshold of 0.25% of shares outstanding or $10 million was 442, compared to 346 for the $10 million or 2.5% threshold in Threshold A of the proposed rule.[365] Additionally, Managers would likely be required to file reports for more securities, which would also increase compliance costs. Indirect costs include increased risk of copycat short selling strategies, which lead to herding and increased volatility, and short sellers engaging in strategic behavior to short sell just underneath Threshold A, which leads to lower price efficiency.[366] In some cases a lower threshold would decrease the indirect costs associated with the proposed rule because it would be harder to identify individual short positions from aggregate reporting if there are many entities reporting, thus lowering the chances that a given security would only have one Manager reporting a short position.[367] This effect may not be universally true, however. In particular, at thresholds just lower than proposed Threshold A, the number of securities where only one entity

[361] *See* Exchange Act Release No. 93784 (Dec. 15, 2021), *available at https://www.sec.gov/rules/proposed/2021/34-93784.pdf.*

[362] Delta is a ratio that measures the change in the value of short position when the value of the long position changes. For example, a delta of one means that a $1 increase in value of the short position results in a $1 decline in value of the long position.

[363] *See supra* note 79 (for links to specific comment letters).

[364] *See supra* Table I. *See also supra* note 81.

[365] *Id.*

[366] *See supra* notes 271 and 353 (for research documenting this behavior in Europe).

[367] *See supra* notes 257 and 278 (with accompanying text for more information on risks of identifying individual short sellers).

reported Form SH increases.[368] This result implies that there are a number of securities for which only one short seller held a significant short position at a level lower than the current cutoff. In these cases, lowering the threshold may increase the risk of identifying individual short sellers.

Conversely, raising the proposed Threshold A lowers many of the costs associated with providing Proposed Form SHO data as fewer entities would be required to report. It also limits somewhat the value of the data—again as the reported data would reflect a smaller portion of overall short positions. For example, in the Form SH data, a threshold of 5% or $25 million suggested in comment letters reduce the coverage to 71% of dollar value of short positions compared to 89% in the proposed rule.[369] Higher thresholds may also come with increased risk of identification and retaliation towards short sellers because at some point the likelihood that more than one investor holds a very large short position diminishes. For example, according to analysis for Form SH data 41% of reported securities would reflect one Manager with a short position at a threshold of $25 million and 5% compared to 24% of reported securities for the proposed Threshold A.[370]

For securities subject to Threshold B, the economic impact of either raising or lowering the dollar threshold would be similar. Raising the threshold would lower compliance costs, but also lower the quality of the data while lowering the threshold would do the opposite. For example, if the Commission raised Threshold B from $500,000 to $10 million, then under the assumption of one manager short selling each Threshold B security, the total number of short positions captured for Threshold B securities would decrease from 23.72% to 8.76%.[371] Similarly, under the same assumptions, lowering the threshold to $50,000 would increase the number of short positions captured to 48.08%.

As another alternative to the proposed Threshold A, the Commission could establish a threshold based on one of the thresholds in Proposed Rule 13f–2—short position as a percent of shares outstanding or the dollar value of the short position. The advantage of this alternative is that it may reduce compliance costs by simplifying reporting requirements. Additionally it would lower overall compliance costs due to fewer entities being required to report as entities that may meet one threshold may not meet another and thus may not be required to report. An alternative including only the 2.5% threshold would have a bigger impact than an alternative including only the $10 million threshold. Commission analysis based on Form SH data suggests that 342 Managers would meet the $10 million threshold and 160 Managers would meet the 2.5% threshold, compared to 346 in Proposed Rule 13f–2.

The alternative of requiring a threshold based only on short positions as a percent of shares outstanding would largely eliminate reporting in larger securities. Short sellers will hit the 2.5% threshold in stocks with market capitalization below $400 million before they hit the $10 million dollar threshold. For stocks with market capitalization above $400 million, short sellers will hit a $10 million dollar threshold before hitting the 2.5% threshold. Consequently, if the Commission required reporting based only on the percent of shares outstanding, then there would be fewer reports of Proposed Form SHO for stocks with larger market capitalizations. Less visibility into the actions of short sellers in larger market capitalization stocks would provide less information about bearish sentiment in the economy, generally because larger market capitalization stocks tend to be more well-established and harder to manipulate.[372] Conversely, if the Commission required reporting based only on the dollar threshold, then there would be fewer reports among stocks with lower market capitalizations. Smaller market capitalization stocks tend to be easier to manipulate and less stable. Thus, less visibility into the actions of short sellers among smaller market capitalization stocks may mitigate somewhat the benefits of reduced manipulative behavior among these stocks articulated in Part VIII.D.1.

As another alternative, the Commission could structure the Reporting Thresholds to include the nominal economic value of short derivative positions. Specifically, reporting on Proposed Form SHO would be required if a Manager's total short position in the stock and in derivatives such as options and security-based swaps exceeded the relevant Reporting Thresholds. This alternative would decrease the likelihood that Managers seek to avoid the Reporting Thresholds by transacting in derivatives and thus, may increase the benefits of the data from Proposed Form SHO.[373] Making it more difficult to circumvent the reporting requirements using derivatives may also decrease strategic, and sub-optimal, trading around the Reporting Thresholds which leads to lower price efficiency.[374] However, increasing the amount of information that is provided in Proposed Form SHO may increase copycat activity that leads to herding and increased volatility. Conversely, increasing the reports may dilute the information and reduce the amount of herding. This alternative could also result in some situations in which Managers would have a reporting obligation despite having large long positions in the equity over the entire month, which would increase costs for the Managers and would provide less relevant information. Additionally, including derivatives in the Reporting Threshold computations would increase the complexity of the rule and the cost of implementing the rule. For instance, Managers may need to pull information from multiple systems to determine the total value of their short position for reporting. Pulling information from multiple systems can be costly.[375] Additionally, while valuing short positions in most equities is fairly straight forward, this is not true for derivatives. There are often multiple methodologies used by different market participants to value derivative contracts such as options. Thus, an alternative including a threshold for a Managers short exposure in derivatives would be significantly more

[368] According to Form SH data, 32% of securities would have only one Manager reporting at or above the currently proposed threshold of $10 Million and 2.5%. If the percent threshold was reduced to 1% along with the $10 million threshold the number of securities with only one Manager reporting would increase to 35%. *See also supra* note 81.

[369] *See* SIFMA letter (discussing Temporary Rule 10a3–T). *See also supra* Table I. *See also supra* note 81.

[370] *See note* 80 (for more information on methodologies and caveats for using Form SH data).

[371] *See supra* Table II (analysis within table).

[372] *See, e.g.,* Carole Comerton-Forde, Tālis J. Putniņš, *Stock Price Manipulation: Prevalence and Determinants,* 18 (1) Rev. of Fin. January 2014, Pages 23–66, *available at https://doi.org/10.1093/rof/rfs040* (for evidence on small and less liquid stocks higher exposure to manipulative behavior by investors).

[373] *See supra* Part VIII.D.8.

[374] *See supra* Part VIII.D.1 (for further discussion on strategic trading around the threshold and how the rule is designed to reduce it).

[375] Industry practices may change with regard to security-based swaps in the case of the adoption of proposed Rule 10B–1, which would require persons with large positions in security-based swaps to track all related securities. *See* Exchange Act Release No. 93784 at 23 (stating that ''proposed Rule 10B–1 would require public reporting of, among other things: (1) Certain large positions in security-based swaps; (2) positions in any security or loan underlying the security-based swap position; and (3) positions in any other instrument relating to the underlying security or loan or group or index of securities or loans'') *available at https://www.sec.gov/rules/proposed/2021/34-93784.pdf.*

complicated than Proposed Rule 13f–2 and Proposed Form SHO.

An alternative could also involve requiring the thresholds to be based on activity and not just positions. This alternative would increase the amount of information available to the Commission regarding the activities of entities engaging in a high volume of short selling. This alternative may provide additional insight into Managers that sell short but do not hold short positions. Specifically, entities with high volumes of short selling are likely to be market makers who use short selling to maintain two sided quotes in the absence of inventory and other high frequency traders. These entities trade in large volumes, but tend to end trading sessions fairly flat on inventory in larger stocks. Consequently, requiring reporting based on activity may not significantly improve the market's ability to assess of bearish sentiment. However, one area where reporting based on activity may be beneficial would be in identifying short selling attacks that are relatively short lived. For example, an investor with a convertible bond may seek to distort the stock price right around the exercise date of their bond as such contracts stipulate that the holder of the convertible bond receives more shares if the stock price is lower. In this case, an attempted manipulator may seek to aggressively short sell right around a convertible bond exercise date. Activity that may be concentrated enough in time to not trigger a Reporting Threshold based on average position over the prior month as is currently stipulated in the proposal. While this activity information may be helpful in flagging unusual short selling activity as the Commission could conceivably build reports based on existing CAT data that would be more effective at detecting such behavior and Proposed Rule 13f–2 would identify these activities if the market participant exceeds the Reporting Thresholds.

The Commission could measure the thresholds as of the last settlement day of the month rather than on any day of the month, as in the $10 million prong, or as the average position over the month, as in the 2.5% prong for Threshold A and the $500,000 threshold in Threshold B. This alternative would have the advantage of simplifying compliance with Proposed Rule 13f–2 and Proposed Form SHO and thus may reduce compliance costs. In the Form SH data, end of month thresholds reduced the number of reporting Managers for the $10 million threshold from 342 to 247, and for the 2.5% threshold from 160 to 127.[376] It would also line the Reporting Thresholds up with the positions reported in Proposed Form SHO whereas a Manager's reported information on Proposed Form SHO under Proposed Rule 13f–2 could be below the Reporting Thresholds.[377] This alternative may also invite more strategic trading around the end of the month than the proposal, which is structured to prevent trading around the threshold. For instance, Managers with short positions near the threshold may temporarily reduce their positions to below a Reporting Threshold on exactly the days that short positions are measured for compliance with the threshold to avoid reporting. This inefficient trading may reduce price efficiency right around the reporting days as trading to avoid holding a position that would trigger reporting is not trading based on economic considerations but rather trading based on regulatory considerations and thus is inefficient and may harm price efficiency on these days.

Instead of Threshold B, the Commission could require the two prong, $10 million maximum position or 2.5% average position, reporting threshold for short positions in an equity security of a non-reporting company issuer that is required for equity securities of reporting company issuers. This approach may be less complex as all short positions would be subject to the same reporting threshold. Further, it would retain a threshold that relates to the size of the short position to the size of the issue to ensure capturing positions that are relatively large whereas the proposed Threshold B imposes a flat threshold that could result in some relatively large positions not being filed on Proposed Form SHO.

However, this alternative would increase the burden for Managers as information for non-reporting issuers can be hard to find, making threshold calculations difficult. In particular, information for the number of shares outstanding can be difficult to obtain for non-reporting issuers and when it is available it is often stale and inaccurate. This could lead to problems with the calculations for the 2.5% threshold. Because the alterative would require knowing shares outstanding of such securities each day, this alternative would effectively impose new recordkeeping costs on Managers as Managers would need to track daily changes in shares outstanding in order to assess the 2.5% threshold. Further, there are multiple sources from which Managers can obtain shares outstanding for securities in non-reporting company issuers. At times these sources may report different numbers for total shares outstanding. Consequently, Managers could also feel the need to track the sources used to identify shares outstanding each day and would incur costs to determine which sources to trust for compliance.

Additionally, the Commission could enhance record keeping requirements associated with the alternative where Threshold A applies to all securities to require Managers to record and report on Form SHO the source of data used to calculate shares outstanding in relation to determining compliance with Threshold A. This could improve the quality of the information reported in the Proposed Form SHO for securities of issuers who do not report with the Commission, by improving the quality of the data that Managers use when calculating their positions. It may also help mitigate concerns that Managers may try to game different data sources to avoid complying with the regulation. For securities of reporting issuers, accurate shares outstanding information is readily available, thus concerns about gaming data sources or using low quality information is not as relevant. However enhanced record keeping requirements would increase the costs to Managers. While the Commission believes that most Managers have ready access to this information, requiring that Managers record and report the information would impose require Managers to further build out systems, in conjunction with the systems already required to report Form SHO, to also capture the source of information used.

4. Other Alternatives

a. Alternative Reporting Frequency or Additional Reporting Delay

As alternatives, the Commission could require reporting at different frequencies than the monthly reporting proposed by the rule. Specifically, the Commission could require reporting at frequencies that are shorter than a month. For example, the Commission could require reporting daily, weekly, bi-weekly, or whenever there is a significant change in short position (as is currently the standard in the European Union), but at least monthly. These alternatives could require reporting if the average short position surpasses the threshold for the month prior to the reporting period or if average positions surpass the threshold

[376] *See supra* Table I.

[377] For example, a Manager's position could exceed the $10 million threshold on the 7th of the month but be below $10 million and 2.5% on the last settlement day of the month.

for the prior period (*e.g.* week, or two weeks). The fundamental tradeoff with such thresholds compares the simplicity of the rule with the potential to game the threshold by strategic trading. Such alternative frequencies face the fundamental tradeoff of increased cost and increased transparency of the data. Put simply, increasing the reporting frequency increases the number of reports and thus increases the cost associated with reporting by a similar factor. Increased reporting frequency could also result in collecting more information than the current proposal. The difference between the information collected in the current proposal and this alternative would mainly come from the frequency and timeliness of the reports. The improved timeliness could increase the risk of copycat strategies, but also improve price efficiency. An additional difference to the data may come from Managers who for a short time have short positions that are subject to Threshold A and are above the 2.5% threshold but below the $10 million threshold, but do not maintain an average short position over 2.5% over the month. These Managers may be required to report with more frequent disclosures.[378]

The Commission could also consider different reporting windows for Managers who meet the threshold short positions to report Proposed Form SHO. The current proposal requires Managers to report Proposed Form SHO within 14 calendar days of the end of each month. Shorter time horizons may increase the cost of reporting as Managers would have less time to gather and submit the data on Proposed Form SHO and may need to build costlier procedures to ensure compliance with the reporting requirement.[379] A mitigating factor is that most of this reporting is likely to be done electronically, consequently it may not take the full 14 calendar days for Managers to gather and file the required data to the Commission.

Additionally, the Commission could adopt different horizons for releasing the aggregated data after the reporting deadline. The fundamental tradeoff in terms of the delay between reporting and when the Commission releases the aggregated data is that a shorter delay increases the relevance of the data, in terms of the bearish sentiment it contains which may improve managerial decision making, as well as providing more timely information about bearish sentiment in the market. At the same time a shorter delay increases the likelihood of copycat behavior which decreases the incentive that short sellers have to gather information potentially leading to lower price efficiency and greater volatility. The converse is true for longer delays. Additionally, a shorter delay provides less time for the Commission to aggregate the data and run checks on the aggregated data to ensure the Commission's aggregation is error-free, and also provides less time for amendments to be filed, both of which could harm the quality of the data.

b. Requiring Information From Customers for Proposed Rule 205

To enhance the value of the buy to cover mark in CAT, the Commission could also modify components of Regulation SHO whereby broker-dealers would be required to gather information from customers regarding whether a purchase meets the definition of buy to cover. In Proposed Rule 205, broker-dealers would be required to mark transactions a buy to cover based only on information to which they currently have access and they would not be required to net such activity across the same customer's accounts at that broker-dealer. This may miss some buy to cover trades that may occur if a Manager uses a broker to execute short sales and a prime broker (or prime brokers) for other long positions. In this case, the broker-dealer managing the purchase of shares would not know that the buy is actually a buy to cover and would thus not mark the trade as such. The current proposal may also miss some transactions that may occur if a Manager uses multiple accounts at the same broker-dealer to trade.

To close this gap in buy to cover data, the Commission could require broker-dealers to collect information from customers concerning whether a given buy trade is a buy to cover trade, when considering positions held at other broker-dealers. This alternative would increase the accuracy of the buy to cover information collected via Proposed Rule 205, which would enhance the benefits discussed in Part VIII.D. However, this alternative would impose significant costs on broker-dealers that do not already collect such information relative to the current proposal as it would require broker-dealers to alter their systems to collect this additional information from customers. It would also impose costs on customers who would likewise need to alter their own systems and to report such information to their broker-dealer. The number of customers incurring those costs would be limited to the number of customers employing multiple broker-dealers to execute trades and maintain positions. For customers with only one broker-dealer, this alternative would not impose any additional costs as in this case their only broker-dealer would have a comprehensive view of the customer's positions from which to determine whether a trade was buy to cover or not.

The Commission could also require broker-dealers to aggregate trades across all accounts by the same purchaser at the same broker-dealer when determining buy to cover status of an order under Proposed Rule 205. This alternative would include short positions held in any account other than the purchasing account, as well as offsetting long positions held by the purchaser in the purchasing account or any other account for purposes of the broker-dealer's ''buy to cover'' order marking determination. This alternative could create more comprehensive buy to cover marks in CAT but would also come with additional compliance costs for broker-dealers as they would need to build out systems to track the net positions of customers across all accounts in real time to determine whether a given order qualified as a buy to cover transaction.

c. Report Proposed Form SHO in Inline XBRL

The proposal would require Proposed Form SHO to be filed in Proposed Form SHO-specific XML, a structured, machine-readable data language. As an alternative, the Commission might require Proposed Form SHO to be filed in Inline eXtensible Business Reporting Language (''Inline XBRL''), a separate data language that is designed for business reporting information and is both machine-readable and human-readable. Compared to the proposal, the Inline XBRL alternative for Proposed Form SHO would provide more sophisticated validation, presentation, and reference features for filers and data users. However, given the fixed and constrained nature of the disclosures to be reported on Proposed Form SHO (*e.g.,* the information would be as of a single reporting date rather than multiple reporting dates, and Managers would not be able to customize the content or presentation of their reported data), the benefits of these additional features would be muted. Compared to the proposal, this alternative would impose greater initial implementation costs (*e.g.,* licensing Inline XBRL filing preparation software) upon reporting persons that have no prior experience

[378] Many Commenters on temporary Rule 10a–3T stated that weekly reporting was overly burdensome. *See supra* note 306.

[379] *See* Seward & Kissel LLP letter (discussing Temporary Rule 10a3–T) at 5, *available at https://www.sec.gov/comments/s7-31-08/s73108-43.pdf.*

structuring data in Inline XBRL.[380] By contrast, because many Managers that would be Proposed Form SHO filers would likely have experience structuring filings in a similar EDGAR Form-specific XML data language, such as in the context of submitting Form 13F, the Proposed Form SHO-specific XML requirement would likely impose lower implementation compliance costs on Proposed Form SHO filers than an Inline XBRL requirement would impose.

G. Request for Comments

The Commission requests comment on all aspects of this Economic Analysis, including whether the analysis has: (1) Identified all benefits and costs, including all effects on efficiency, competition, and capital formation; (2) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation; and (3) identified and considered reasonable alternatives to the proposed new rules and rule amendments. We request and encourage any interested person to submit comments regarding the proposed rules, our analysis of the potential effects of the proposed rules and proposed amendments, and other matters that may have an effect on the proposed rules. We request that commenters identify sources of data and information as well as provide data and information to assist us in analyzing the economic consequences of the proposed rules and proposed amendments. We also are interested in comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked. In addition to our general request for comments on the Economic Analysis associated with the proposed rules and proposed amendments, we request specific comment on certain aspect of the proposal:

- Q35: *Short Selling Data.* The Economic Analysis discusses several existing sources of short selling data and the limitations of each.

○ Are the Commission's descriptions of existing short selling data accurate? Why or why not? Please explain. Are there other relevant existing data sources that the Commission should consider as a part of the baseline? If so, please describe them.

○ Are the Commission's descriptions of the various limitations in existing short selling data accurate? Please explain. Are there limitations that the Commission has not discussed? If so, please describe these limitations.

- Q36: *Additive Information in Proposed Rule 13f–2 and Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT.* These Proposed Rules would require the reporting of short sale information to EDGAR or to CAT.

○ Would Proposed Rule 13f–2 and Proposed Form SHO provide information to the public that is additive to what the public can already access? Would these proposals solve some or all of the data limitations discussed in the Economic Analysis? Why or why not?

○ Would Proposed Rule 205 and the Proposal to Amend CAT solve the data limitations discussed in the Economic Analysis? Why or why not? Are there significant limitations, beyond those discussed above, in the design of the data for the public in Proposed Rule 13f–2 and Proposed Form SHO that limits the utility of the data to the public?

○ Are there significant limitations, beyond those discussed above, in the design of the data available to regulators in Proposed Rule 13f–2 and Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT?

- Q37: *Market Oversight and Investor Protection.* The Economic Analysis describes how the information from the Proposed Rules could be used to, for example, strengthen regulatory oversight of short selling and facilitate market reconstructions.

○ Would the Proposed Rule 13f–2 and Proposed Form SHO help to strengthen regulatory oversight and facilitate market reconstructions? Please explain. What would the role of each of the components of Proposed Form SHO to these regulatory activities? Are there any other regulatory activities facilitated by these proposed rules? If so, please describe.

○ Would Proposed Rule 205 and the Proposal to Amend CAT help to strengthen regulatory oversight and facilitate market reconstructions? Please explain. Are there any other regulatory activities facilitated by these proposed rules? If so, please describe.

○ Would the additional regulatory oversight of short selling from the Proposed Rules help deter manipulative short selling behavior? Why or why not? What are some other potential benefits to investors of the regulatory activities facilitated by the Proposed Rules?

- Q38: *Market Quality.* The Economic Analysis describes both potential improvements to market quality and potential harms to market quality that could result from the published data from Proposed Rule 13f–2 and Proposed Form SHO. In addition, the Economic Analysis describes potential improvements to market quality that could result from Proposed Rule 205 and Proposed Amendments to CAT.

○ Overall, would the Proposed Rules, on net, improve or harm market quality? Please explain. Please discuss the extent, if any, to which each proposed rule contributes to the overall effect on market quality.

○ Would the information published from Proposed Rule 13f–2 and Proposed Form SHO be useful to market participants and provide information that is not already reflected in prices? Please explain. For example, would the published data help market participants better understand existing short interest information by lining up the position information with a short interest settlement date, by identifying the aggregate positions held by reporting Managers, by identifying the extent to which reporting Manager positions are fully or partially hedged, or by revealing the daily changes in reporting Manager short positions? Please explain. As a result, would such information improve price efficiency and market liquidity? Please explain.

○ Would the regulatory activities facilitated by Proposed Rule 13f–2 and Proposed Form SHO, Proposed Rule 205, and the Proposal to Amend CAT improve price efficiency and market liquidity? Please explain.

○ Would the compliance costs associated with Proposed Rule 13f–2 and Proposed Form SHO lead to a reduction in shorting significant enough to negatively affect price efficiency and/or market liquidity? Why or why not?

○ Would the published data from Proposed Rule 13f–2 and Proposed Form SHO result in short selling Managers being more vulnerable to fundamental information leakage, the revelation of trading strategies, or short squeezes and other forms of retaliation? Please explain. Would any of these effects be significant enough to negatively affect price efficiency and/or market liquidity? Why or why not? For example, would these effects significantly reduce the incentive of Managers to engage in fundamental research? Please explain and identify the particular part of elements of the published data that would result in such effects.

○ Would Managers seek to reduce their short positions to avoid exceeding

[380] *See* Inline XBRL Filing of Tagged Data, Securities Act Release No. 10514 (June 28, 2018), 83 FR 40846 at 40862, *available at https://www.sec.gov/rules/final/2018/33-10514.pdf* (discussing costs associated with Inline XBRL filing of operating company financial statements and investment company risk/return summaries, including software licensing costs).

a Reporting Threshold or to report a lower short position than the Manager typical holds? Please explain. What would be the effect of such behavior on price efficiency and market liquidity? Please explain.

○ To what degree does the structure of the data, such as the level of aggregation, threshold structure and delayed publication help to mitigate any potential negative effects of Proposed Rule 13f–2 and Proposed Form SHO? Please explain.

○ Despite these mitigating factors, could market participants identify the particular Managers and their reported positions and activity? If so, what are the additional risks and costs faced by such Managers? Please explain.

○ Are option market makers likely to exceed the Reporting Thresholds? If so, what would be the effect on price efficiency and market liquidity of such inclusion? Please explain.

• Q39: *XML Requirement.*

○ Would requiring the proposed short sale disclosures to be filed on EDGAR in Proposed Form SHO-specific XML increase the economic effects of the disclosure requirement by making the reported data more useful to users? Why or why not?

○ How would the costs and benefits of an Inline XBRL requirement compare to the Proposed Form SHO-specific XML requirement for the proposed short sale disclosures?

○ Would requiring short sale disclosures be filed in Proposed Form SHO-specific XML facilitate more efficient review and analysis of the reported short sale disclosures by the Commission? Why or why not?

○ Would the costs of the XML requirement vary by the type of Manager likely to file Proposed Form SHO? If so, please explain which Managers would incur higher or lower costs.

• Q40: *Compliance Costs.*

○ Has the Commission appropriately evaluated the compliance costs associated with the Proposed Rules? Please explain. What are the primary cost drivers of the Proposed Rules?

○ Would Proposed Rule 13f–2 and Proposed Form SHO have lower compliance costs than former Rule 10a3–T? Please explain.

○ Would the Proposed to Amend CAT to add information on buy to cover and bona fide market making require an additional field or fields to CAT? If so, what would the estimated cost be to add said fields?

○ Would Proposed Rule 205 and Proposal to Amend CAT to include buy-to-cover information be less costly than the ''open/close'' indicator that was not included the CAT NMS Plan? Please explain.

○ Would the Reporting Thresholds impose a significant burden on Managers who do not meet the threshold but must track their positions to know if they at some point exceed the threshold? Please Explain.

○ Would the compliance costs associated with the Proposals vary by the various type of Manager? Would the costs of the XML requirement vary by the type of Manager likely to file Proposed Form SHO? If so, please explain which Managers would incur higher or lower costs.

○ Do Managers other than registered investment advisers and option market makers hold large short positions such that they would exceed the Reporting Thresholds in Proposed Rule 13f–2? If so, which types of Managers are likely to hold such short positions? Would the effects of including such Managers in Proposed Rule 13f–2 be any different than those described herein? Please explain.

• Q41: *Other Economic Effects.*

○ Has the Commission appropriately evaluated the potential impact of the Proposals on corporate managerial decision making? Why or why not?

○ Would the Proposals result in less securities lending and potentially lower returns for investors in mutual funds, pension plans, and other securities lenders?

○ Please discuss whether and how the adoption of the Proposals would impact securities lending market.

○ Are there any economic effects not discussed in the Economic Analysis? If so, please describe them.

• Q42: *Potential Circumvention.*

○ Has the Commission accurately characterized economic short disclosure in equity versus in derivatives markets? Why or why not?

○ Would market participants circumvent reporting requirements by trading derivatives? Why or why not?

○ How costly would it be to include reporting regarding securities other than equities, such as options and security based swaps, in Proposed Form SHO?

○ What additional benefit would there be to requiring reporting in Proposed Form SHO of short positions arising from securities other than equities, such as options and security based swaps, in Proposed Form SHO?

• Q43: *Efficiency, Competition, and Capital Formation.*

○ Has the Commission appropriately evaluated the potential impact of the Proposals on efficiency, competition, and capital formation? Please explain.

○ Would the Proposed Rules have any effect on efficiency other than the potential effects on price efficiency?

○ Would Proposed Rule 13f–2 and Proposed Form SHO alter the competitive landscape in the market to attract investor flows by disadvantaging Managers who sell short relative to Managers who do not sell short? Please explain.

○ Would the overall effect on price efficiency of the Proposed Rules be significant enough to affect capital formation? Please explain. Would additional information on short selling help corporate managers make better investment decisions, thereby improving capital formation? Please explain. Would the Proposed Rules reduce capital formation by discouraging investment in convertible securities by raising the cost to hedge? Please explain. Would the Proposed Rules promote capital formation through enhanced investor confidence? Please explain.

• Q44: *Alternatives, Generally.*

○ Are the Commission's descriptions and analyses of potential alternatives to the Proposed Rules accurate? Why or why not? Are there any other alternatives? If so, please describe the alternative(s) including how the benefits and costs of the alternative(s) compare to the benefits and costs of the Proposed Rules.

• Q45: *Alternative Approaches.*

○ Has the Commission appropriately evaluated the alternative whereby short selling information would be collected using CAT, including bona fide market making and buy to cover information, then aggregated and published? Why or why not? Would this alternative raise any security issues associated with CAT, either in the collection of such new information or in the publication of aggregated CAT data? Please explain.

○ Has the Commission appropriately evaluated the alternative whereby the bi-monthly short interest collected by FINRA would be codified, FINRA would be required to publish a version of its short interest information that specifically identifies the aggregate short interest of Managers, and/or non-FINRA Managers would be required to report to FINRA? Why or why not?

○ Has the Commission appropriately evaluated the alternative whereby broker-dealers would file Proposed Form SHO reports with the Commission on behalf of Managers? Why or why not?

○ Has the Commission appropriately evaluated the alternative whereby Proposed Rule 13f–2 and Proposed Form SHO would be explicitly crafted to be consistent with European disclosure requirements, including reporting thresholds? Why or why not?

• Q46: *Data Modification Alternatives.*

○ Has the Commission appropriately evaluated the alternative whereby the information included in Proposed Form SHO would be released in a different manner, including releasing Proposed Form SHO reports exactly as they are filed, identifying the Managers, releasing Proposed Form SHO as filed but stripped of Manager identities, releasing the number of entities whose Proposed Form SHO reports were filed, aggregating at the issuer level as opposed to the security level, releasing aggregations of the various categories of changes in short positions, and/or releasing the daily aggregate increases in short positions separately from the daily aggregate decreases in short positions? Why or why not?

○ Has the Commission appropriately evaluated the alternative whereby Managers who report Proposed Form SHO would also be required to disclose their derivatives positions on underlying equity securities? Why or why not?

○ Has the Commission appropriately evaluated the alternative whereby Managers would report net short positions instead of gross short positions, taking into account any hedging that the Manager engages in, and/or the delta value of their hedged positions? Why or why not?

○ Has the Commission appropriately evaluated the alternative whereby Managers would report data sources on Proposed Form SHO? Why or why not?

• Q47: *Threshold Modifications.*

○ Has the Commission appropriately evaluated the alternative whereby the Reporting Thresholds would be modified compared to Thresholds A and B in Proposed Rule 13f–2, including a higher or lower or no threshold, a threshold based on short position as a percent of shares outstanding or dollar value of the short positions, including the nominal economic value of short derivative positions, a threshold based on activity, and/or measuring the threshold as of the last settlement day of the month? Why or why not?

○ Would decreasing the threshold to include more Managers improve the quality of the data provided? Would increasing or decreasing the threshold increase the risk of copycat trading strategies? Would increasing or decreasing the threshold to include more Managers' positions in the aggregated reports reduce the risk of identifying individual investment Managers? Please explain.

○ Would including the nominal economic value of short derivative positions as a consideration for the threshold increase, decrease or have no impact on the risk copycat trading? Please explain. Including the nominal economic value of short derivative positions as a consideration for the threshold may require some Managers to report short positions that are part of hedges of large long positions. Would this information be beneficial? Please explain.

○ Has the Commission appropriately evaluated the alternative of including a threshold based on short selling activity? If not, please describe the costs or benefits of this alternative relative to the proposal. Would a short selling activity threshold provide additional beneficial information? Please explain. Would a short selling activity threshold be more burdensome on Managers? Please explain. If the Commission were to adopt a threshold based on short selling activity, what should the level of the threshold be?

○ Has the Commission appropriately evaluated the alternative of calculating the threshold based on positions on the last day of the month? If not, please describe the costs or benefits of this alternative relative to the proposal. Would such a threshold provide data that is as beneficial as the current proposal? Would calculating the threshold based on the last day of month lead to Managers strategically lowering their short positions to avoid reporting? Please explain.

○ Has the Commission appropriately evaluated the alternative of using the two prong threshold for short positions in an equity security of a non-reporting company issuer? If not, please describe the cost or benefits of this alternative relative to the proposal. Is reliable shares outstanding information available for non-reporting issuers? Please explain.

• Q48: *Other Alternatives.*

○ Has the Commission appropriately evaluated the alternative whereby reporting would be required at a different frequency, a different reporting window, and/or releasing aggregated data at a different horizon than in Proposed Rule 13f–2? Why or why not?

○ Has the Commission appropriately evaluated the alternative whereby Regulation SHO would be modified, including requiring broker-dealers to collect information from customers concerning whether a given buy trade is a buy to cover trade when considering positions held at other broker-dealers, and/or requiring broker-dealers to aggregate all accounts at the same broker-dealer when determining buy to cover status of an order? Why or why not?

○ How costly it would be to have Mangers who use prime brokers inform their introducing brokers when buying-to-cover?

○ Has the Commission appropriately evaluated the alternative whereby Proposed Form SHO information would be submitted in Inline XBRL? Why or why not?

IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [381] requires federal agencies, in promulgating rules, to consider the impact of those rules on small businesses. Section 603(a) of the Administrative Procedure Act, as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small businesses'' unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of ''small entities.''

Certification for Proposed Rule 13f–2 and New Proposed Form SHO. Although Section 601(b) of the RFA defines the term ''small business,'' the statute permits agencies to formulate their own definitions. The explanation of the term ''small entities'' and the definition of the term ''small business'' in Rule 0–10 [382] of the Exchange Act do not explicitly reference Managers. Rule 0–10 does provide, however, that the Commission may ''otherwise define'' small entities for purposes of a particular rulemaking proceeding. For purposes of Proposed Rule 13f–2 and related Proposed Form SHO, therefore, the Commission has determined that the definition of the term ''small business'' found in Rule 0–7(a) [383] under the Investment Advisers Act of 1940 [384] is more appropriate to the functions of institutional managers such as the Managers with reporting obligations under Proposed Rule 13f–2. The Commission believes that the proposed definition would help ensure that all persons or entities that might be Managers subject to reporting requirements under Proposed Rule 13f–2 will be included within a category addressed by the Rule 0–7(a) definition. Therefore, for purposes of this rulemaking and the RFA, a Manager is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total

[381] 5 U.S.C. 601 *et seq.*

[382] 17 CFR 240.0–10 (''Rule 0–10'').

[383] 17 CFR 275.0–7(a) (''Rule 0–7(a)'').

[384] 15 U.S.C. 80b–1 *et seq.*

assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[385] The Commission requests comments on the use of this definition from Rule 0–7(a) under the Investment Advisers Act of 1940.

Under Proposed Rule 13f–2, Managers are not required to report on Proposed Form SHO unless they meet or exceed a specified Reporting Threshold. Managers with short interest positions in equity securities of a reporting company issuer would be subject to a two-pronged short reporting threshold structure—a short position in an equity security with a U.S. dollar value of $10M or more, or a monthly average short position as a percentage of shares outstanding of the equity security of at least 2.5% (Threshold A). Managers with short interest positions in equity securities of a non-reporting company issuer would be subject to a single-pronged short reporting threshold structure—a short position in an equity security with a U.S. dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month (Threshold B). While the parameters of the Reporting Thresholds under Proposed Rule 13f–2 relate to the number and dollar value of shares of short positions, rather than assets under management, the Commission nevertheless believes that application of the Reporting Thresholds would result in Proposed Rule 13f–2 not applying to a significant number of ''small businesses'' as defined under Rule 0–7(a).

With respect to the first prong of Threshold A, the $10M trigger would represent forty (40) percent of the assets of an entity that qualifies as a ''small entity'' under Rule 0–7(a). The Commission believes it is also unlikely that a significant number of small entities would place 40% of their respective assets under management in a short position in a single security. Further, many types of institutional investment managers that could be small entities, including bank trustees, endowments, and foundations, are subject to fiduciary standards that prohibit them from investing in large, concentrated short positions. Such restrictions would deter small entities (with less than $25M of assets under management) from investing over $10M (greater than 40%) of their assets in a single short position, and therefore prevent them from triggering the first prong of Threshold A.[386]

With respect to the second prong of Threshold A, smaller Managers (those with under $25M in assets under management) would likely try to leverage their assets through a combination of traditional short sales and derivative and similar transactions that create economically short exposure to a security. Such entities therefore, would likely engage in strategies that do not lend themselves to a clear determination that the second prong of Threshold A under Proposed Rule 13f–2 has been met.[387] Further, the Commission estimates, based on an analysis of U.S. common stocks,[388] that Managers that qualify as small entities under Rule 0–7(a) would not meet the 2.5% reporting threshold for securities representing over ninety-eight percent (98%) of the overall market value.[389]

When it comes to meeting the dollar value limits of Threshold B and the first prong of Threshold A, it is important to note that for the subset of Managers that engage in the most short selling activity, hedge funds,[390] less than twenty-five (25) percent have less than $50M in assets under management.[391] Indeed, research shows that most hedge funds have assets under management above the amount that would qualify them as small entities under Rule 0–7(a), *i.e.,* above $25M.[392]

For these reasons, the Commission certifies that Proposed Rule 13f–2 would not have a significant economic impact on a substantial number of small entities, as defined under Rule 0–10, for purposes of the RFA. The Commission requests written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small businesses and provide empirical data to support the extent of the impact.

Certification for Proposed Rule 205. As discussed in the PRA section above, the Commission believes that all broker-dealers whose accounts or whose customers' accounts could hold a gross short position are potentially in scope for the requirements of Proposed Rule 205.[393] A broker-dealer is a small entity if it has total net capitalization (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d), and it is not affiliated with any person (other than a natural person) that is not a small business or small organization.[394]

Based on a review of data relating to the broker-dealers potentially in scope for Proposed Rule 205, the Commission does not believe that any of those broker-dealers would qualify as small entities under the above definition because they either exceed $500,000 in total capital or are affiliated with a person that is not a small entity as defined in Rule 0–10. It is possible that in the future a small entity may come within the scope of Proposed Rule 205. Based on experience with broker-dealers that engage in short selling, however, the Commission believes that this scenario will be unlikely because firms that enter that market are likely to exceed $500,000 in total capital or be

[385] Rule 0–7(a), *supra* note 384. *See generally Reporting Threshold for Institutional Investment Managers,* Exchange Act Release No. 89290 (July 10, 2020), 85 FR 46016, 46031 n.90 (July 31, 2020) (stating that ''[r]ecognizing the growth in assets under management at investment advisers since Rule 0–7(a) was adopted, the Commission plans to revisit the definition of a small entity in Rule 0–7(a).'').

[386] *See* Molk and Partnoy, *supra* note 187 (describing impediments that have kept different types of institutional investment managers from engaging in short selling).

[387] *Id.* at 839 (positing that ''institutions incorporate short selling into their strategies, not necessarily by taking net-short positions, but instead by combining leveraged long equity index positions with smaller actively managed short portfolios.'').

[388] A small entity, with less than $25M in assets under management, would not be able to hold a short position of at least 2.5% in a company with a market capitalization above $1B. Such companies represent over 98.5% of the overall market cap of U.S. equities. *See also* Stock Market Size Categories (2021), *available at https://stockmarketmba.com/sizecategories.php* (calculating approximately three percent (3%) of the U.S. stock market consists of common stocks of companies with less than $2B in market capitalization (*i.e.,* small-cap and micro-cap stocks) and noting that micro-cap companies are generally too small for even most large institutional investment managers to invest in).

[389] An analysis by Commission of the daily dataset of the Center for Research in Security Prices (''CRSP'') showed that for the month of October 2021, on average, the number of companies with less than $1B in market capitalization (2,293) constituted 1.51% of the overall market capitalization.

[390] *See* Molk and Partnoy, *supra* note 187, at 846.

[391] *See* David Goldin, Elephant in the room? Size and hedge fund performance, Aurum (June 28, 2019), *available at https://www.aurum.com/insight/elephant-in-the-room-size-and-hedge-fund-performance/.*

[392] *See* Daniel Barth et al., The Hedge Fund Industry is Bigger (and Has Performed Better) Than You Think (Office of Fin. Research, Working Paper No. 20–01, Feb. 25, 2020, Revised Mar. 8, 2021).

[393] *See supra* Part VII.C.2. While recognizing that not all broker-dealers will necessarily enter purchase orders in securities in a manner that will subject them to the marking requirements of Proposed Rule 205, the Commission estimates, for purposes of the PRA, that all of the 3,551 broker-dealers registered with the Commission as of December 31, 2020, will do so.

[394] Exchange Act Rule 0–10(c).

affiliated with a person that is not a small entity.

For the foregoing reasons, the Commission certifies that Proposed Rule 205 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

Certification for the Proposal to Amend CAT. The proposed amendments to the CAT NMS Plan would impose requirements on the CAT NMS Plan Participants (the national securities exchanges registered with the Commission under Section 6 of the Exchange Act and FINRA), broker-dealers which are in scope for the requirements of Proposed Rule 205 and have the obligation to report order receipt and origination reports to the CAT, and broker-dealers that effect short sales utilizing the bona-fide market making exception pursuant to Rule 203(b)(2)(iii) of Regulation SHO and report to the CAT.

With respect to the national securities exchanges, the Commission's definition of a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 of Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[395] None of the national securities exchanges registered under Section 6 of the Exchange Act that would be subject to the proposed amendments are ''small entities'' for purposes of the RFA. In addition, FINRA is not a ''small entity.'' [396] With respect to broker-dealers which are in scope for the requirements of Proposed Rule 205 and have CAT reporting obligations, as discussed above, the Commission does not believe that any of those broker-dealers would qualify as small entities pursuant to Exchange Act Rule 0–10(c).[397] Similarly, based on Commission knowledge and experience with broker-dealers that identify as market makers, the Commission does not believe that any broker-dealer that effects short sales utilizing the bona-fide market making exception pursuant to Rule 203(b)(2)(iii) of Regulation SHO and reports to the CAT would qualify as a small entity pursuant to Exchange Act Rule 0–10(c), because they either exceed $500,000 in total capital or are affiliated with a person that is not a small entity as defined in Rule 0–10. The Commission believes that it is possible, but unlikely, that in the future a small entity may come within scope of the Proposal to Amend CAT, because firms that enter either market are likely to exceed $500,000 in total capital or be affiliated with a person that is not a small entity.

For the foregoing reasons, the Commission certifies that the Proposal to Amend CAT would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

X. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission is also requesting information regarding the potential impact of Proposed Rule 13f–2, Proposed Rule 205, and the Proposal to Amend CAT on the economy on an annual basis. In particular, comments should address whether the proposals, if adopted, would have a $100,000,000 annual effect on the economy, cause a major increase in costs or prices, or have a significant adverse effect on competition, investment, or innovations. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Statutory Authority and Text of Proposed Rules 13f–2 and 205, and Form SHO

List of Subjects

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 242

Brokers, Reporting and recordkeeping requirements, securities.

Text of Proposed Rule Amendments

In accordance with the foregoing, the Commission is proposing to amend title 17, chapter II of the Code of the Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for part 240 continues to read as follows, and the sectional authority for § 240.13f–2(T) is removed.

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

■ 2. Add § 240.13f–2 to read as follows:

§ 240.13f–2 Reporting by institutional investment managers regarding gross short position and activity information.

(a) An institutional investment manager shall file a report on Form SHO (cite to be added), in accordance with the form's instructions, with the Commission within 14 calendar days after the end of each calendar month with regard to:

(1) Each equity security of an issuer that is registered pursuant to Section 12 of the Exchange Act or for which the issuer is required to file reports pursuant to Section 15(d) of the Exchange Act over which the institutional investment manager and all accounts over which the institutional investment manager (or any person under the institutional investment manager's control) has investment discretion collectively have either:

(i) A gross short position in the equity security with a U.S. dollar value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month, or

(ii) A monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5% or more; and

(2) Each equity security of an issuer that is not registered pursuant to Section 12 of the Exchange Act or for which the issuer is not required to file reports pursuant to Section 15(d) of the Exchange Act over which the institutional investment manager and all accounts over which the institutional investment manager (or any person under the institutional investment manager's control) has investment discretion collectively have a gross short position in the equity security with a U.S. dollar value of $500,000 or more at the close of regular trading hours on any

[395] *See* 17 CFR 240.0–10(e) (stating that a broker-dealer is a small entity if it has total net capitalization (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d), and it is not affiliated with any person (other than a natural person) that is not a small business or small organization).

[396] *See* 13 CFR 121.201.

[397] *See supra* note 395, and accompanying text.

settlement date during the calendar month.

(3) Form SHO and any amendments thereto must be filed with the Commission via the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR''), in accordance with Regulation S–T. Certain information regarding each equity security reported by institutional investment managers on Form SHO and filed with the Commission via EDGAR will be published by the Commission, on an aggregated basis.

(b) For the purposes of this rule:

(1) The term ''institutional investment manager'' has the same meaning as in Section 13(f)(6)(A) of the Exchange Act.

(2) The term ''equity security'' has the same meaning as in Section 3(a)(11) of the Exchange Act and Rule 3a11–1 thereunder.

(3) The term ''investment discretion'' has the same meaning as in Rule 13f–1(b) under the Exchange Act.

(4) The term ''gross short position'' means the number of shares of the equity security that are held short, without inclusion of any offsetting economic positions, including shares of the equity security or derivatives of such equity security.

(5) The term ''regular trading hours'' has the same meaning as in Rule 600(b)(77) under the Exchange Act.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 3. The authority citation for part 242 continues to read in part as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 4. Add § 242.205 to read as follows:

§ 242.205 Purchase Order Marking for Data Collection Purposes.

(a) A broker-dealer must mark an order to purchase an equity security for an account as ''buy to cover'' if the person purchasing the equity security has any gross short position in the equity security in the same account. The ''buy to cover'' mark applies to purchases made by the broker-dealer for its own account, or to purchases made by the broker-dealer on behalf of another person through the person's account held at that broker-dealer.

(b) Reserved

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 5. The general authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012), Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), and secs. 2 and 3 Pub. L. 116–222, 134 Stat. 1063 (2020), unless otherwise noted.

■ 6. Add § 249.333 to read as follows:

§ 249.333 Form SHO, report of institutional investment managers pursuant to Section 13(f)(2) of the Securities Exchange Act of 1934.

This form shall be used by institutional investment managers that are required to furnish reports pursuant to Section 13(f)(2) of the Securities Exchange Act of 1934. (15 U.S.C. 78m(f)(2) and Rule 13f–2 thereunder (§ 240.13f–2 of this chapter)).

Note: The text of Form SHO will not appear in the Code of Federal Regulations.

OMB Number: XXXX–XXXX

Form SHO

Information Required of Institutional Investment Managers Pursuant to Section 13(f)(2) of the Securities Exchange Act of 1934 and Rules Thereunder

General Instructions

Rule as to Use of Form SHO. Institutional investment managers (''Managers'') must use Form SHO for reports to the Commission required by Rule 13f–2 [17 CFR 240.13f–2] promulgated under Section 13(f)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(f)(2)] (''Exchange Act''). A Manager shall file a report on Form SHO in accordance with these instructions, with the Commission within 14 calendar days after the end of each calendar month with regard to: (1) Each equity security of an issuer that is registered pursuant to Section 12 of the Exchange Act or for which the issuer is required to file reports pursuant to Section 15(d) of the Exchange Act over which the Manager and all accounts over which the Manager (or any person under the Manager's control) has investment discretion collectively have either (A) a gross short position in the equity security with a U.S. dollar value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month, or (B) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5% or more; and (2) each equity security of an issuer that is not registered pursuant to Section 12 of the Exchange Act or for which the issuer is not required to file reports pursuant to Section 15(d) of the Exchange Act over which the Manager and all accounts over which the Manager (or any person under the Manager's control) has investment discretion collectively have a gross short position in the equity security with a U.S. dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month. For purposes of Rule 13f–2 and Form SHO, ''regular trading hours'' shall have the meaning ascribed in Rule 600(b)(77) under the Exchange Act [17 CFR 242.600(b)(77)].

A Manager that determines that it has filed a Form SHO with errors that affect the accuracy of the short sale data reported must file an amended and restated Form SHO within ten (10) calendar days of discovering the error.

Rules to Prevent Duplicative Reporting. If two or more Managers, each of which is required by Rule 13f–2 to file Form SHO for the reporting period, exercise investment discretion with respect to the same securities, only one such Manager must report the information in its report on Form SHO. If a Manager has information that is required to be reported on Form SHO and such information is reported by another Manager (or Managers), such Manager must identify the Manager(s) reporting on its behalf in the manner described in Special Instruction 5.

Filing of Form SHO. A reporting Manager must file Form SHO with the Commission via the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR''), in accordance with Regulation S–T. The Commission plans to publish certain data from the filings on an aggregated basis.

All information that would reveal the identity of a Manager filing a Form SHO report with the Commission, or the identity of any Other Manager listed on the Cover Page of a Form SHO report, is deemed subject to a confidential treatment request under 17 CFR 240.24b–2. The Commission plans to publish only aggregated data derived from information provided in Form SHO reports.

Technical filing errors may cause delays in the filing of Form SHO. Technical support for making Form SHO reports is available through EDGAR Filer Support. Support for questions regarding non-technical issues related to Form SHO reporting is available through the Office of Interpretation and Guidance of the

Division of Trading and Markets (''TM OIG'') at *TradingAndMarkets@sec.gov.*

Instructions for Calculating Reporting Threshold

A Manager shall file a report on Form SHO:

- With regard to each equity security of an issuer that is registered pursuant to section 12 of the Exchange Act or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (a ''reporting company issuer'') in which the Manager meets or exceeds under either of the following circumstances: (1) The Manager, and all accounts over which the Manager, or any person under the Manager's control, has investment discretion, collectively have a gross short position in the equity security with a U.S. dollar value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month; or (2) the Manager, and all accounts over which the Manager, or any person under the Manager's control, has investment discretion, collectively have a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5% or more (''Threshold A'').
- With regard to any equity security of an issuer that is not a reporting company issuer as described above (a ''non-reporting company issuer'') in which the Manager meets or exceeds a gross short position in the equity security with a U.S. dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month (''Threshold B'').

With respect to each equity security to which the circumstances described in Threshold A or Threshold B applies, the Manager shall report the information, as described in the ''Special Instructions'' below, aggregated across accounts over which the Manager, or any person under the Manager's control, has investment discretion.

To determine whether the dollar value threshold described in (1) of Threshold A above is met, a Manager shall determine its end of day gross short position on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date.

To determine whether the dollar value threshold described in Threshold B above is met, a Manager shall determine its end of day gross short position in the equity security on each settlement date during the calendar month and multiply that figure by the closing price at the close of regular trading hours on the settlement date. If such closing price is not available, a Manager shall use the price at which it last purchased or sold any share of that security.

To determine whether the percentage threshold described in (2) of Threshold A above is met, the Manager shall (a) identify its gross short position (as defined in Rule 13f–2) in the equity security at the close of each settlement date during the calendar month of the reporting period, and divide that figure by the number of shares outstanding in such security at the close of that settlement date, and (b) add up the daily percentages during the calendar month as determined in (a) and divide that total by the number of settlement dates during the calendar month of the reporting period. The number of shares outstanding of the security for which information is being reported shall be determined by reference to an issuer's most recent annual or quarterly report, and any subsequent update thereto, filed with the Commission.

Special Instructions

1. This form consists of two parts: The Cover Page, and the Information Tables.

Cover Page

2. The period end date used in the report (and in the EDGAR submission header) is the last settlement day of the calendar month. The date shall name the month, and express the day and year in Arabic numerals, with the year being a four-digit numeral (*e.g.,* 2022).

3. Amendments to Form SHO must restate the Form SHO in its entirety. If the Manager is filing the Form SHO report as an amendment, then the Manager must check the ''Amendment and Restatement'' box on the Cover Page; and enter the amendment number. Each Amendment and Restatement must include a complete Cover Page and Information Tables. Amendments must be filed sequentially.

a. In the space designated on the Cover of Page of each Amendment and Restatement, a Manager shall (1) provide a written description of the revision being made; (2) explain the reason for the revision; and (3) indicate whether data from any additional Form SHO reporting period(s) (up to the past 12 calendar months) is/are affected by the Amendment and Restatement. If (3) applies, a Manager shall complete and file a separate Amendment and Restatement for each previous calendar month so affected (up to the past 12 months) and provide a description of the revision being made and explain the reason for the revision.

b. If the data being reported in an Amendment and Restatement affects the data reported on the Form SHO reports filed in at least three of the immediately preceding Form SHO reporting periods, the Manager, within two (2) business days after filing the Amendment and Restatement, must provide the Commission staff, via TM OIG at *TradingAndMarkets@sec.gov,* with notice of (1) this circumstance; and (2) an explanation of the reason for the revision.

c. If a revision reported in an Amendment and Restatement changes a data point reported in the Form SHO being amended by twenty-five percent (25%) or more, the Manager must notify the Commission staff via TM OIG at *TradingAndMarkets@sec.gov* within two (2) business days after filing the Amendment and Restatement.

4. The Cover Page shall include only the required information. Do not include any portions of the Information Tables on the Cover Page.

5. Designate the Report Type for the Form SHO by checking the appropriate box in the Report Type section of the Cover Page, and include, where applicable, the Name and active Legal Entity Identifier (''LEI'') (if available) of each of the Other Managers Reporting for this Manager on the Cover Page, and the Information Tables, as follows:

a. If all of the information that a Manager is required by Rule 13f–2 to report on Form SHO is reported by another Manager (or Managers), check the box for Report Type ''FORM SHO NOTICE,'' include on the Cover Page the Name and active LEI (if available) of each of the Other Managers Reporting for this Manager, and omit the Information Tables.

b. If all of the information that a Manager is required by Rule 13f–2 to report on Form SHO is reported in this report, check the box for Report Type ''FORM SHO ENTRIES REPORT,'' omit the ''Name and Active LEI (if available) of each of the Other Managers Reporting for this Manager'' section of the Cover Page, and include the Information Tables.

c. If only a part of the information that a Manager is required by Rule 13f–2 to report on Form SHO is reported in this report, check the box for Report Type ''FORM SHO COMBINATION REPORT,'' include on the Cover Page the name and active LEI (if available) of each of the Other Managers Reporting for this Manager, and include the Information Tables.

Information Tables

6. Do not include any additional information in the Information Tables.

Do not include any portions of the Information Tables on the Cover Page.

7. In reporting information required on Information Tables 1 and 2, Managers must account for and report a gross short position in an ETF, and activity that results in the acquisition or sale of shares of the ETF resulting from call options exercises or assignments; put options exercises or assignments; tendered conversions; secondary offering transactions; or other activity, as discussed further below. In determining its gross short position in an equity security, however, a Manager is not required to consider short positions that the ETF holds in individual underlying equity securities that are part of the ETF basket.

8. *Instructions for Information Table 1—Manager's Gross Short Position Information:*

a. Column 1. Settlement Date. Enter in Column 1 the last day of the calendar month of the reporting period on which a trade settles (''settlement date'').

b. Column 2. Issuer Name. Enter in Column 2 the name of the issuer of the security for which information is being reported. Reasonable abbreviations are permitted.

c. Column 3. Issuer LEI. If the issuer has an LEI, enter the issuer's active LEI in Column 3.

d. Column 4. Title of Class. Enter in Column 4 the title of the class of the security for which information is being reported. Reasonable abbreviations are permitted.

e. Column 5. CUSIP Number. Enter in Column 5 the nine (9) digit CUSIP number of the security for which information is being reported, if applicable.

f. Column 6. FIGI. Enter in Column 6 the twelve (12) character, alphanumeric Financial Instrument Global Identifier (''FIGI'') of the security for which information is being reported, if a FIGI has been assigned.

g. Column 7. End of Month Gross Short Position (Number of Shares). Enter in Column 7 the number of shares that represent the Manager's gross short position in the security for which information is being reported at the close of regular trading hours on the last settlement date of the calendar month of the reporting period. The term ''gross short position'' means the number of shares of the security for which information is being reported that are held short, without inclusion of any offsetting economic positions—including shares of the reportable equity security or derivatives of such security.

h. Column 8. End of Month Gross Short Position (rounded to nearest USD). Enter in Column 8 the US dollar value of the shares reported in Column 7, rounded to the nearest dollar. A Manager shall report the corresponding dollar value of the reported gross short position by multiplying the number of shares of the security for which information is being reported by the closing price at the close of regular trading hours on the last settlement date of the calendar month. In circumstances where such closing price is not available, the Manager shall use the price at which it last purchased or sold any share of that security.

i. Column 9. Extent of Hedge for Short Position Identified in Column 7. Enter in Column 9 whether the identified position is fully hedged (''F''), partially hedged (''P''), or not hedged (''0''). A Manager shall indicate that a reported gross short position in an equity security is ''fully hedged'' if the Manager also holds an offsetting position that reduces the risk of price fluctuations for its entire position in that equity security, for example, through ''delta'' hedging (in which the Manager's reported gross short position is offset 1-for-1), or similar hedging strategies. A Manager shall report that it is ''partially hedged'' if the Manager holds an offsetting position that is less than the identified price risk associated with the reported gross short position in that equity security.

9. *Instructions for Information Table 2—Daily Activity Affecting Manager's Gross Short Position During the Reporting Period:*

a. Column 1. Settlement Date. Enter in Column 1 each date during the reporting period on which a trade settles (settlement date). The Manager shall report information for each settlement date during the calendar month reporting period as described in these instructions.

b. Column 2. Issuer Name. Enter in Column 2 the name of the issuer of the equity security for which information is being reported. Reasonable abbreviations are permitted.

c. Column 3. Issuer LEI. If the issuer has an LEI, enter the issuer's active LEI in Column 3.

d. Column 4. Title of Class. Enter in Column 4 the title of the class of the security for which information is being reported. Reasonable abbreviations are permitted.

e. Column 5. CUSIP Number. Enter in Column 5 the nine (9) digit CUSIP number of the security for which information is being reported, if applicable.

f. Column 6. FIGI. Enter in Column 6 the twelve (12) character, alphanumeric FIGI of the security for which information is being reported, if a FIGI has been assigned.

g. Column 7. Number of Shares Sold Short. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that resulted from short sales and settled on that date.

h. Column 8. Number of Shares Purchased to Cover an Existing Short Position. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that were purchased to cover, in whole or in part, an existing short position and settled on that date.

i. Column 9. Number of Shares Purchased in Exercised Call Option Contracts. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that are acquired in a call option exercise that reduces or closes a short position on that security and settled on that date.

j. Column 10. Number of Shares Sold in Exercised Put Option Contracts. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that are sold in a put option exercise that creates or increases a short position on that security and settled on that date.

k. Column 11. Number of Shares Sold in Assigned Call Option Contracts. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that are sold in a call option assignment that creates or increases a short position on that security and settled on that date.

l. Column 12. Number of Shares Purchased in Assigned Put Option Contracts. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that are acquired in a put option assignment that reduces or closes a short position on that security and settled on that date.

m. Column 13. Number of Shares Resulting from Tendered Conversions. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that are acquired as a result of the tendered conversions that reduces or closes a short position on that security and settled on that date.

n. Column 14. Number of Shares Obtained through Secondary Offering Transactions. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that were obtained through a secondary offering transaction that reduces or closes a short position on that security and settled on that date.

o. Column 15. Other Activity that Creates or Increases a Manager's Short Position. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that resulted from other activity not previously reported on this form that creates or increases a short position on that security and settled on that date. Other activity to be reported includes, but is not limited to, shares resulting from ETF creation or redemption activity.

p. Column 16. Other Activity that Reduces or Closes a Manager's Short Position. For the settlement date set forth in Column 1, enter the number of shares of the security for which information is being reported that resulted from other activity not previously reported on this form that reduces or closes a short position on that security and settled on that date. Other activity to be reported includes, but is not limited to, shares resulting from ETF creation or redemption activity.

Paperwork Reduction Act Information

Persons who are to respond to the collection of information contained in this form are not required to respond to the collection of information unless the form displays a currently valid Office of Management and Budget (''OMB'') control number.

OMB Number: XXXX–XXXX

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM SHO

FORM SHO COVER PAGE

Report for the Period Ended: [Month/Day/Year]

Check here if Amendment and Restatement [ ]; Amendment Number:

Description of the Amendment and Restatement, Reason for the Amendment and Restatement, and Which Additional Form SHO Reporting Period(s) (up to the past 12 calendar months), if any, is/are affected by the Amendment and Restatement:

Institutional Investment Manager (''Manager'') Filing Report:

Name: _____

Mailing Address: _____

Business Telephone and Facsimile Number: _____

Active Legal Entity Identifier (''LEI''): __

Contact Employee:

Name and Title: _____

Telephone Number: _____

Facsimile Number: _____

Date Filed: _____

The Manager filing this report hereby represents that all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.

Report Type (Check only one):

[ ]FORM SHO ENTRIES REPORT. (Check here if all entries of this reporting Manager are reported in this report.)

[ ]FORM SHO NOTICE. (Check here if no entries reported are in this report, and all entries are reported by other reporting Manager(s).)

[ ]FORM SHO COMBINATION REPORT. (Check here if a portion of the entries for this reporting Manager is reported in this report and a portion is reported by other reporting Manager(s).)

Name and Active LEI of each of the Other Manager(s) Reporting for this Manager: [If there are no entries in this list, omit this section.]

Name: _____

Active LEI: _____

[Repeat as necessary.]

INFORMATION TABLE 1—MANAGER'S GROSS SHORT POSITION INFORMATION

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9
Settlement Date (Month End).	Issuer Name	Issuer LEI	Title of Class ...	CUSIP Number	FIGI	End of Month Gross Short Position (Number of Shares).	End of Month Gross Short Position (rounded to nearest USD).	Extent of Hedge for Position Identified in Column 7.

(Repeat as Necessary).

INFORMATION TABLE 2—DAILY ACTIVITY AFFECTING MANAGER'S GROSS SHORT POSITION DURING THE REPORTING PERIOD

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10
Settlement Date.	Issuer Name	Issuer LEI ...	Title of Class.	CUSIP Number.	FIGI	Number of Shares Sold Short.	Number of Shares Purchased to Cover an Existing Short Position.	Number of Shares Purchased in Exercised Call Option Contracts.	Number of Shares Sold in Exercised Put Option Contracts.

Column 11	Column 12	Column 13	Column 14	Column 15	Column 16
Number of Shares Sold in Assigned Call Option Contracts.	Number of Shares Purchased in Assigned Put Option Contracts.	Number of Shares Resulting from Tendered Conversions.	Number of Shares Obtained Through Secondary Offering Transactions.	Other Activity that Creates or Increases Manager's Short Position.	Other Activity that Reduces or Closes Manager's Short Position.

(Repeat as Necessary).

Dated: February 25, 2022.

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2022–04670 Filed 3–15–22; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 87 Wednesday,
No. 51 March 16, 2022

Part III

Securities and Exchange Commission

Notice of the Text of the Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-Related Data Collection; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94314; File No. S7–08–22]

Notice of the Text of the Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-Related Data Collection

AGENCY: Securities and Exchange Commission.

ACTION: Notice of the text of the proposed amendments to national market system plan.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing notice of the text of the proposed amendments to the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan'') in connection with the Commission's issuance of Release No. 34–94313, the ''Short Position and Short Activity Reporting by Institutional Investment Managers'' (the ''Proposing Release'').

FOR FURTHER INFORMATION CONTACT: Andrew Sherman, Special Counsel; and David Cohen, Attorney-Advisor, Office of Market Supervision, Division of Trading and Markets; and Timothy M. Riley, Branch Chief; Patrice M. Pitts, Special Counsel; James R. Curley, Special Counsel; Quinn Kane, Special Counsel; Jessica Kloss, Attorney-Advisor; Brendan McLeod, Attorney-Advisor; and Josephine J. Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, at (202) 551–5777.

In the Proposing Release, the Commission is proposing for comment a new rule prescribing a ''buy to cover'' order marking requirement under Regulation SHO (Proposed Rule 205) (17 CFR 242.205), as well as new Rule 13f–2 (Proposed Rule 13f–2) (17 CFR 240.13f–2) and related form (Proposed Form SHO) (17 CFR 249.XXX) under the Securities Exchange Act of 1934 (''Exchange Act''). Proposed Rule 13f–2 would require certain institutional investment managers to report, on a monthly basis on new Proposed Form SHO, certain short position data and short activity data for certain equity securities as prescribed in Proposed Rule 13f–2. Proposed Rule 205 would establish a new ''buy to cover'' order marking requirement for certain purchase orders effected by a broker-dealer for its own account or for the account of another person at the broker-dealer. In the Proposing Release, the Commission is also proposing amendments to the CAT NMS Plan that would require the reporting to the Consolidated Audit Trail of (i) ''buy to cover'' order marking information and (ii) reliance on the bona fide market making exception in Regulation SHO. This Notice is being given of the text of the proposed amendments to the CAT NMS Plan. For a full discussion of the proposed amendments to the CAT NMS Plan, see the Proposing Release.

To comment on the proposed amendments to the CAT NMS Plan (including the text contained in this notice), please provide comments to the rulemaking file S7–08–22, as outlined in the Proposing Release.

Statutory Authority and Text of Amendments to the CAT NMS Plan

Pursuant to the Exchange Act and, particularly, Sections 2, 3, 5, 6, 11A(a)(3)(B), 15, 15A, 17(a) and (b), 19, and 23(a) thereof, 15 U.S.C. 78b, 78c, 78e, 78f, 78k–1, 78o, 78o–3, 78q(a) and (b), 78s, 78w(a), and pursuant to Rule 608(a)(2) and (b)(2) thereunder, the Commission proposes to amend the CAT NMS Plan in the manner set forth below.

Amend Section 6.4 of the CAT NMS Plan by modifying subparagraphs (d)(ii)(B) and (C) and adding subparagraphs (d)(ii)(D) and (E).

BILLING CODE 8011–01–P

The revisions read as follows. Additions are underlined; deletions are [bracketed].

Section 6.4. Data Reporting and Recording by Industry Members.

(d) Required Industry Member Data

(i) No change.

(ii) No change.

(A) No change.

(1) – (3) No change.

(B) if the trade is cancelled, a cancelled trade indicator; [and]

(C) for original receipt or origination of an order, the Firm Designated ID for the relevant Customer, and in accordance with Section 6.4(d)(iv), Customer Account Information and Customer Identifying Information for the relevant Customer[.];

(D) for the original receipt or origination of an order to buy an equity security, whether such buy order is for an equity security that is a "buy to cover" order as defined by Rule 205(a) of Regulation SHO (17 CFR § 242.205(a)); and

(E) for the original receipt or origination of an order to sell an equity security, whether the order is a short sale effected by a market maker in connection with bona-fide market making activities in the security for which exception Rule 203(b)(2)(iii) of Regulation SHO is claimed.

By the Commission.

Dated: February 25, 2022.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2022–04671 Filed 3–15–22; 8:45 am]

BILLING CODE 8011–01–C

Reader Aids

Federal Register

Vol. 87, No. 51

Wednesday, March 16, 2022

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, MARCH

11275–11580 1
11581–11922 2
11923–12388 3
12389–12554 4
12555–12852 7
12853–13114 8
13115–13624 9
13625–13900 10
13901–14142 11
14143–14380 14
14381–14756 15
14757–15024 16

CFR PARTS AFFECTED DURING MARCH

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
10342 11923
10343 11925
10344 11927
10345 11929
10346 12389
10347 13115

Executive Orders:
14066 13625
14067 14143
14068 14381

Administrative Orders:
Memorandums:
Memorandum of February 25, 2022, 2022 14755
Memorandum of March 1, 2022 12391
Notices:
Notice of March 2, 2022 12387
Notice of March 3, 2022 ..... 12553, 12555, 12557

5 CFR

Proposed Rules:
1600 11516
1601 11516
1605 11516
1620 11516
1631 11516
1640 11516
1645 11516
1650 11516
1651 11516
1653 11516
1655 11516
1690 11516
7001 12888

7 CFR

761 13117
762 13117
764 13117
765 13117
766 13117
768 13117
785 13117
3560 11275

8 CFR

204 13066
205 13066
208 14757
245 13066

9 CFR

201 11933

Proposed Rules:
381 14182

10 CFR

11 12853
25 12853
50 11934
95 12853
431 13901

Proposed Rules:
20 12254
26 12254
50 ..... 11986, 12254
51 12254
52 12254
72 12254
73 12254
140 12254
429 ..... 11892, 13648, 14622
430 ..... 11326, 11327, 11892, 11990, 12621, 13648, 14622
431 ..... 11335, 11650, 12802, 14186

11 CFR

111 11950

12 CFR

Ch. X 11286, 11951
1238 14763
1240 14764

Proposed Rules:
700 11996
701 11996
702 11996
708a 11996
708b 11996
750 11996
790 11996

14 CFR

23 13911
25 13127
39 ..... 11289, 12559, 12561, 12565, 12569, 12571, 13129, 13135, 13138, 13923, 13926, 13930, 14153, 14155, 14158, 14385, 14772, 14778, 14780
71 ..... 11954, 11955, 12393, 12394, 12395, 12574, 12854, 12855, 14161, 14163, 14388, 14390, 14391, 14392, 14394, 14396, 14399, 14400, 14401
95 11290
97 ..... 12395, 12397, 14165, 14167

Proposed Rules:
39 ..... 11355, 12627, 14187
71 ..... 11358, 11359, 11361, 11362, 11364, 11657, 12000, 12001, 12408, 12630, 12898, 12900, 12901, 13237, 13663, 13665, 13666, 14190, 14192

15 CFR

734 ..... 12226, 13048

736.....13048
738 .....12226, 12856, 13048, 14785
740.....12226, 13048
742.....12226, 13048
744 .....12226, 13048, 13141
746 .....12226, 12856, 13048, 13627, 14785
772.....12226

16 CFR

Proposed Rules:
4.....12003, 13668
462.....13951
1112.....11366
1261.....11366

17 CFR

Proposed Rules:
230.....13524
232.....13524, 13846
239.....13524
240 .....11659, 13846, 14950
242.....14950
249.....14950
270.....13524
274.....13524
275.....13524
279.....13524

21 CFR

1.....14169
6.....12399
7.....12401
112.....14169
117.....14169
121.....14169
507.....14169
862.....14171
888.....11293
1141.....11295

25 CFR

140.....13153
141.....13153
211.....13153
213.....13153
225.....13153
226.....13153
227.....13153
243.....13153
249.....13153

26 CFR

1.....13935
300.....11295

Proposed Rules:
300.....11366

27 CFR

5.....13156
9.....13157, 13160

Proposed Rules:
9.....13238

28 CFR

0.....12402

29 CFR

1610.....14799
1612.....14799
1989.....12575
4044.....14403

Proposed Rules:
2570.....14722

31 CFR

35.....13628
587.....11297

Proposed Rules:
223.....12003
285.....11660

33 CFR

100 .....11304, 12588, 13165, 14404
117.....12860
165 .....11305, 11308, 11581, 11583, 12590, 13165, 13168, 13170, 14404
401.....12590
402.....11585

Proposed Rules:
100.....14193, 14814
165.....11371, 13958

34 CFR

81.....11309

Proposed Rules:
Ch. II.....14197

36 CFR

Proposed Rules:
251.....11373

37 CFR

201.....12861
222.....12861
223.....13171

38 CFR

78.....13806

39 CFR

111.....11587

40 CFR

52 .....11310, 11957, 11959, 12404, 12592, 12866, 12869, 13177, 13179, 13634, 13936, 14799, 14802
55.....11961
63.....13183
158.....11312
180 .....11312, 11315, 11319, 11965, 12872, 13636, 13640, 13945
271.....13644
281.....12593
300.....14805
312.....14174
751.....12875

Proposed Rules:
52 .....11373, 11664, 12016, 12020, 12033, 12631, 12902, 12904, 12905, 12912, 13668, 14210, 14817
63.....12633
81 .....11664, 12020, 12033, 12905, 12912, 13668, 14210
312.....14224

41 CFR

Proposed Rules:
300–3.....12048
300–70.....12048
301–2.....12048
301–10.....12048
301–11.....12048
301–13.....12048
301–53.....12048
301–70.....12048
301–71.....12048
App. C. to Ch. 301 12048
304–3.....12048
304–5.....12048

42 CFR

1.....12399
404.....12399
1000.....12399

Proposed Rules:
68.....12919

43 CFR

3160.....14177
9230.....14177

44 CFR

1.....11971

45 CFR

8.....12399
200.....12399
300.....12399
403.....12399
1010.....12399
1300.....12399

47 CFR

54.....13948, 14180
73.....11588, 14404

Proposed Rules:
1.....11379
27.....11379
54.....14421
73.....12641

48 CFR

Ch. 1.....12780, 12798
13.....12780
25.....12780
52.....12780
538.....11589
552.....11589

Proposed Rules:
212.....12923
225.....12923
252.....12923
802.....13598
807.....13598
808.....13598
810.....13598
813.....13598
819.....13598
832.....13598
852.....13598
853.....13598

49 CFR

385.....13192
390.....13192
391.....13192
393.....12596
565.....13209
566.....13209
567.....13209
586.....13209
591.....13209
595.....14406

Proposed Rules:
383.....13247, 13249
571.....12641

50 CFR

11.....13948
17.....14662
229.....11590, 11978
300.....12604
622.....11596, 14419
635.....11322
660.....11597
679 .....11599, 11626, 12406

Proposed Rules:
17 .....12056, 12338, 14227
92.....14232
300.....12409
635.....12643, 12648
648.....11680, 12416
660.....11382

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *https://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available at *https://www.govinfo.gov*. Some laws may not yet be available.

H.R. 3665/P.L. 117–98

To designate the medical center of the Department of Veterans Affairs in San Diego, California, as the Jennifer Moreno Department of Veterans Affairs Medical Center, and to support the designation of a component of such medical center in honor of Kathleen Bruyere. (Mar. 14, 2022; 136 Stat. 40)

S. 854/P.L. 117–99

Methamphetamine Response Act of 2021 (Mar. 14, 2022; 136 Stat. 43)

S. 1543/P.L. 117–100

Suicide Training and Awareness Nationally Delivered for Universal Prevention Act of 2021 (Mar. 15, 2022; 136 Stat. 44)

S. 1662/P.L. 117–101

Supporting the Foundation for the National Institutes of Health and the Reagan-Udall Foundation for the Food and Drug Administration Act (Mar. 15, 2022; 136 Stat. 47)

S. 3706/P.L. 117–102

To provide for the application of certain provisions of the Secure Rural Schools and Community Self-Determination Act of 2000 for fiscal year 2021. (Mar. 15, 2022; 136 Stat. 48)

Last List March 15, 2022

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://listserv.gsa.gov/cgi-bin/wa.exe?SUBED1=PUBLAWS-L&A=1*

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.